265 N.C. App.—No. 2 Pages 113-383

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 28, 2020

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 7 MAY 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Certificate of need—agency decision—appeal to administrative law judge—substitution of judgment—An administrative law judge (ALJ) improperly substituted his own judgment for that of the state agency (N.C. Department of Health and Human Services) in deciding which of two applicants would be granted a certificate of need for an MRI machine. Although the state agency had discretion to choose which factors it would consider in comparing applications, the ALJ deviated from the agency's analysis by considering additional factors. **Raleigh Radiology LLC v. N.C. Dep't of Health & Human Servs., 249.**

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Abandonment of issue—summary judgment—breach of contract—Plaintiffs failed to preserve for review any argument regarding their breach of contract claims by not addressing the issue on appeal. Although the trial court's order granting summary judgment to defendants on plaintiffs' negligence claim did not specifically mention the breach of contract claim, plaintiffs' failure to make any argument other than to assert that the claim was not ripe for review constituted abandonment. **Poage v. Cox, 229.**

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Waiver—unsworn expert testimony—motion to strike denied—no cross-appeal or argument—Defendants' failure to cross-appeal from the denial of their motions to strike unsworn expert-prepared materials (which were submitted by plaintiffs in response to defendants' motions for summary judgment) or to argue on appeal that the trial court abused its discretion constituted a waiver of the argument that the materials should not be considered on appeal. **Poage v. Cox, 229.**

ATTORNEY FEES

Child support action—findings of fact—sufficiency—The trial court's findings adequately addressed a mother's insufficient means to defray the cost of a child support action, the court was not required to compare the parties' relative estates before awarding attorney fees, and the court made the necessary findings that the amount awarded was reasonable. Further, the father had adequate notice and an opportunity to be heard on the issue of attorney fees, including after the mother's attorney filed an amended affidavit, to which no objection was made. Where the child support order was vacated and remanded for other reasons, the attorney fee award was also vacated, to be reconsidered after a new determination on the mother's monthly child support expense. **Thomas v. Burgett, 364.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Disposition—findings of fact—sufficiency—On appeal from the initial disposition in a juvenile case, in which the trial court placed the mother's two children with a family friend, the disposition orders were reversed and remanded because they contained multiple findings of fact that were conclusory and unsupported by competent evidence. Notably, the record lacked any substantive evidence regarding the family friend, her home, or care of the children, but contained ample evidence that the mother had fully complied with her family services agreement and with all recommendations from the Department of Social Services. **In re B.C.T., 176.**

Responsible Individuals List—due process-notice—Petitioner's name could not be added to the Responsible Individuals List (RIL) where the county department of social services waited nearly four years to notify petitioner of its intent to place him on the RIL—well beyond the statutory timeframe for giving such notice (N.C.G.S. § 7B-320)—and thereby prejudiced Petitioner's ability to prepare a defense. **In re Harris, 194.**

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CHILD CUSTODY AND SUPPORT

Custody granted to a non-parent—findings of fact—basis in competent evidence—In a juvenile case, a civil order granting full custody of a mother's minor child to a family friend was reversed and remanded because the trial court's findings of fact—including its findings that the family friend was a "fit and proper person" to have custody and that the mother acted inconsistently with her constitutionally protected status as a parent—were not based on any competent evidence. **In re B.C.T., 176.**

Support—extraordinary expenses—after-school activity—speculative evidence—In calculating a father's child support obligation, the trial court's determination that his child required $500 per month for band expenditures was not based on competent evidence where the child had not yet been accepted to the honor band to which she had applied. If, on remand (for another issue), the trial court heard nonspeculative evidence from which it could determine the child was actually participating in the band, it was directed to make findings in support of any award based on those expenses. **Thomas v. Burgett, 364.**

Support—monthly gross income—deductions—rental property expenses—A child support order was vacated and remanded for more specific findings regarding a father's rental property expenses where there was no indication that the trial court took into account the rental property's insurance and property tax expenditures when calculating gross monthly income. The Court of Appeals declined to remand for findings regarding imputation of rental income—based on the mother's argument that the father deliberately rented the property to his son below market value—because the mother did not raise the issue in the trial court. **Thomas v. Burgett, 364.**

condition (caused by the top step's irregular height) despite having descended the stairs just moments before he tripped. This evidence created two genuine issues of material fact—whether the hazard was hidden or open and obvious, and whether plaintiff had equal or superior knowledge of the hazard—precluding a decision as a matter of law that the church did not owe plaintiff a duty to warn of the hazardous condition. **Draughon v. Evening Star Holiness Church of Dunn, 164.**

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PRETRIAL PROCEEDINGS

Criminal prosecution—trial calendar—section 7A-49.4—notice requirement—prejudice analysis—Defendant failed to demonstrate he was prejudiced by the State's failure to publish the trial calendar ten days prior to trial as required by N.C.G.S. § 7A-49.4(e) where the trial was scheduled months in advance and then continued multiple times, giving defendant adequate notice to prepare. Further, defendant's assertion that he could have called certain witnesses who would have given favorable testimony was speculative and did not constitute a showing that the outcome of the trial would have been different had he been given the statutory notice. **State v. Jones, 293.**

Motion for summary judgment—trial court decision—prior to end of discovery period—prejudice—Plaintiffs in a negligence action did not demonstrate they were prejudiced by the trial court's entry of summary judgment for defendants before the discovery period ended, because plaintiffs were not awaiting any responses to discovery requests, nor did they request additional discovery in order to defend against the summary judgment motions. **Poage v. Cox, 229.**

SENTENCING

Aggravating factors—notice requirement—waiver—In a prosecution for drug offenses, defendant waived his right to receive the 30-day advance notice of the State's intent to use an aggravating factor to enhance his sentence (required by N.C.G.S. § 15A-1340.16(a6)) where he stipulated to the existence of the aggravating factor after a colloquy conducted in accordance with section 15A-1022.1. **State v. Wright, 354.**

SMALL CLAIMS

Prevailing party—appeal to district court—to bring counterclaims exceeding $10,000—standing—The party that prevailed in a small claims action lacked standing to appeal the judgment to district court in order to bring counterclaims that exceeded the $10,000 amount-in-controversy "ceiling" for small claims courts. The prevailing party's inability to bring her counterclaims in small claims court did not render her an aggrieved party with standing to appeal. Rather, the appropriate avenue to bring her counterclaims was a new, separate action in district court (N.C.G.S. § 7A-219). **J.S. & Assocs., Inc. v. Stevenson, 199.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CLEMONS v. CLEMONS

[265 N.C. App. 113 (2019)]

BARBARA CORRIHER CLEMONS, PLAINTIFF
v.
GEORGE BELL CLEMONS, DEFENDANT

No. COA18-433

Filed 7 May 2019

Divorce—equitable distribution—property classification—stipulation of separate property—binding on court

The trial court erred by classifying part of the value of a townhouse as marital where the parties stipulated in a pretrial order that the townhouse was the wife's separate property. Discussion in court regarding a "marital component" referred to the debt on the townhouse but not the townhouse itself. Nothing in the court hearing transcript indicated any intent by the parties to set aside any of the stipulations, nor could the trial court have set aside the stipulation without notice to allow the parties to present evidence to value the marital component.

Judge BERGER dissenting.

Appeal by plaintiff from judgment entered 1 December 2017 by Judge Donna H. Johnson in District Court, Cabarrus County. Heard in the Court of Appeals 31 October 2018.

Ferguson, Hayes, Hawkins & Demay, PLLC, by Edwin H. Ferguson, Jr., for plaintiff-appellant.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Lori P. Jones and Hope Derby Carmichael, for defendant-appellee.

STROUD, Judge.

Wife appeals from an equitable distribution order valuing the "marital portion" of a townhome she owned prior to marriage at $90,000.00 and distributing it to Wife and distributing $90,000.00 of marital debt on the same property to her. Because the parties stipulated in the pretrial order that the townhome was Wife's separate property, the trial court erred by classifying part of its value as marital property and making its distribution based upon this classification and valuation. We reverse and remand.

I. Background

Husband and Wife were married on 6 September 2003 and separated on 21 March 2015. On 2 July 2015, Wife filed a complaint against Husband with claims for equitable distribution with an unequal division in her favor, postseparation support, and alimony.[1] Husband answered and joined in Wife's request for equitable distribution but requested an unequal division in his favor. A pretrial order was entered on 13 November 2017 with detailed schedules of property and issues in contention. In this order, as relevant to the issues on appeal, Husband and Wife stipulated that the "Townhome" with a "Net Value" of "186,000.00" was the separate property of Wife.[2] At trial, the parties agreed that the balance of the debt secured by the townhome as of the date of separation was $90,000.00, all of which was incurred during the marriage, but they did not stipulate to the classification and distribution of this debt. Wife contended the debt was marital, and Husband contended that at least some portion of the debt was Wife's separate debt.

On 1 December 2017, the trial court entered the equitable distribution order. The trial court considered the parties' contentions for unequal distribution but determined that an equal distribution was equitable. The trial court determined that the "marital component" of the townhome was $90,000.00 and distributed it as marital property to Wife and distributed the $90,000.00 mortgage debt to Wife. The trial court calculated that the value of the gross marital estate including this "marital" value of the townhome and thus calculated the net value of the marital estate as "(-)$8,566.62" and awarded an equal division of the marital property and debt. As a result, Wife owed Husband a distributive award of $539.31. Wife timely appealed.

II. Jurisdiction

This Court has jurisdiction to review this equitable distribution order under North Carolina General Statute § 50-19.1:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce

1. Our record does not indicate the status of the postseparation and alimony claims, but those are not relevant to this appeal.

2. It appears that $186,000.00 was actually the *gross* value of the townhome, since the parties agreed that the $90,000.00 debt was secured by the townhome, so the *net* value would therefore be $96,000.00, but the exact value does not change our analysis on appeal.

> from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2017).

III. Standard of Review

> The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Clark v. Dyer, 236 N.C. App. 9, 13, 762 S.E.2d 838, 839 (2014).

IV. Classification and Valuation of "Marital Component" of the Townhome

On appeal, Wife challenges several of the trial court's findings of fact and related conclusions of law, all relating to the classification of the townhome.

> Upon application of a party for an equitable distribution, the trial court shall determine what is the marital property and shall provide for an equitable distribution of the marital property in accordance with the provisions of N.C. Gen. Stat. § 50-20. In so doing, the court must conduct a three-step analysis. First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Chafin v. Chafin, ___ N.C. App. ___, ___, 791 S.E.2d 693, 698 (2016) (quotation marks, brackets, and ellipsis omitted).

Wife challenges portions of the following findings and related conclusions of law:

> [4. b.] 7) Around 2000, Ms. Clemons purchased a townhome located [in] Concord for about $160,000.00. Just prior to the marriage, Ms. Clemons mortgaged the property. The mortgage was paid off, but the source of the funds are unknown. The parties mortgaged the property during the marriage. The parties agreed that the mortgage on the property at the date of separation was $90,000.00. The tax value on the townhome was $161,190.00 on March 20, 2006. There was no appraisal done on the home at or near the date of separation. Therefore, the marital portion is at least equal the marital debt of $90,000.
>
> . . . .
>
> [4.] g. On Schedule L, the parties agreed that those items, which includes the former marital residence, is the separate property of Ms. Clemons with the exception of the marital component noted above.
>
> . . . .
>
> [5. e.] 1) The former marital residence was owned by Ms. Clemons prior to the marriage. She mortgaged the property prior to the marriage to invest in Mr. Clemon's [sic] business. Later the home was mortgaged at least once more for $90,000.00. Limited documentation was available regarding the marital component.

Wife challenges portions of these findings as unsupported by the evidence or contrary to the stipulations in the pretrial order.

Finding of fact 4 (g) noting "the exception of the marital component noted above" is not supported by competent evidence in the record and is contrary to the parties' stipulation. The pretrial order does not include any mention of a "marital component" of the townhome or any issue of valuation of a "marital component" or valuation of an increase in value of the townhome during the marriage. And there was no evidence which could support classification or valuation of a "marital component." The parties stipulated only that the townhome was Wife's separate property, with a date of separation value of $186,000.00. Neither party introduced

evidence needed to value a "marital component" of the townhome, most likely because they had stipulated that it was entirely separate.

It is well-established that stipulations in a pretrial order are binding upon the parties and upon the trial court. *See Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E.2d 482, 486 (1971) ("[S]tipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge."). "Accordingly, the effect of a stipulation by the parties withdraws a particular fact from the realm of dispute." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 101, 730 S.E.2d 784, 789 (2012) (brackets and quotation marks omitted).

In equitable distribution cases, stipulations in the pretrial order are intended to limit the evidence needed and to define the issues the trial court must decide. *See id.* at 106-07, 730 S.E.2d at 792 ("We also note that this is an equitable distribution case, where a pre-trial order including stipulations such as those in this case is required by N.C. Gen. Stat. § 50-21(d) and Local Rule 31.9. In equitable distribution cases, because of the requirements of statute and local rules, the stipulations are frequently quite extensive and precise and are specifically intended to limit the issues to be tried, and the same is true in this case. Neither party has cited, and we cannot find, any prior opinion by our Court in which a trial court has *ex mero motu* set aside a pre-trial order or a party's stipulations *after* completion of the trial upon the issues which the stipulations addressed." (citation omitted)). And as noted by the dissent, although it is possible for either the trial court or parties to set aside stipulations under certain conditions, none of those conditions are present here.

The dissent takes Wife's counsel's brief comment about a "marital component" out of context and construes it as an agreement to assign a "marital component" to the value of the townhome, but this was not what her counsel was saying. Wife's counsel was actually arguing that the $90,000.00 *debt* was entirely marital or had a marital component, not the townhome. At trial, Husband took the position that the $90,000.00 debt was *not* marital; Wife contended that it was marital.

The "marital component" comment occurred during Husband's cross examination testimony about the $90,000.00 debt. Wife's counsel asked Husband:

> [Mr. Ferguson:] And this $90,000 loan or $90,000 debt various times was used to make improvements on the property.

[Husband:] Well, --

[Mr. Ferguson:] Yes or no?

[Husband:] *No*, and I'll say -- the only reason I say that is that that was the balance on the mortgage at the time. The original mortgage that had been paid down at that time was, I think, 102,000 and the -- 'cause we'd been paying an accelerated amount on the principal. We were down to about 90,000.

[Mr. Ferguson:] *Well, whatever balance was owed on the town home on the date that you separated, the 90,000, no dispute as to marital debt?*

[Husband:] That is correct.

[Mr. Ferguson:] And I believe your testimony was that the --

> MS. CAIN: Your Honor, I'm going to object to that question. That draws a legal conclusion, whether or not it's marital.
>
> THE COURT: Well, the whole pretrial order is based on that contention, stuff like marital and not marital and separate and --
>
> MS. CAIN: *Well, yes, but that debt actually is on a schedule. We don't agree that it's marital.*
>
> THE COURT: Okay. Well, I don't know how else you're going to ask him what he thinks the debt is on the date of separation to resolve the difference, then. He either agrees to it or he has an estimate of what it was.
>
> MS. CAIN: I don't --
>
> THE COURT: On the date of separation, what do you think the debt was on the home, the town home?
>
> [Husband]: I believe it was about 90,000.
>
> MS. CAIN: *We're not disputing that; we're disputing that it's marital.*
>
> MR. FERGUSON: The debt was --

> THE COURT: Well, they've agreed that the debt was incurred during the marriage and that it was paid down during the marriage to 90,000. That's the testimony thus far.
>
> MS. CAIN: Yes. I understand that. But it's also for property, assets and property, that she is keeping. Normally, the debt goes with the asset.
>
> THE COURT: I don't know that she's keeping it. I'll have to decide how the property's going to be divided *unless she put that on A where they've agreed to that.*

(Emphasis added.)

Neither the townhome nor the $90,000.00 debt was on Schedule A of the Pretrial order, which was "a list of marital property upon which there is an agreement by and between the parties hereto as to both value and distribution." The townhome was on Schedule L, "a list of the separate property, if any, of the [Wife] upon which there is an agreement and stipulation by and between the parties hereto as to both value and distribution." The townhome is listed on Schedule L as Wife's separate property, to be distributed to Wife. Wife's attorney then pointed this out:

> MR. FERGUSON: Her separate property, I believe it's listed under Schedule L.
>
> THE COURT: There's still a marital portion of it that's subject to be distributed.
>
> MR. FERGUSON: It's a marital component. No dispute.
>
> THE COURT: Uh-huh.
>
> MR. FERGUSON: *That's what I'm trying to establish here.*

(Emphasis added.)

Going back to the beginning of the line of questioning, Wife's attorney attempted to get Husband to agree that the $90,000.00 *debt* was marital; Husband's counsel objected to the characterization of the debt as marital and noted that Husband did *not* agree that the debt was marital. Wife's counsel was certainly not trying to establish that the townhome or any portion of its value was marital, since this classification would be entirely opposed to Wife's interests. Instead, he pointed out to the trial court that the townhome was listed on Schedule L, as Wife's separate property, to be distributed to her. Thus, the "marital component" comment, read in context of the testimony and discussion in the trial

court, is not a reference to classification of any portion of the value of the townhome. During the same discussion, Wife's counsel points out the stipulation in Schedule L of the pretrial order; he does not "invite error" or waive the stipulation. Nothing in the testimony, counsel's other statements to the court, or arguments indicates any intention to set aside any of the stipulations.[3] Nor can the trial court set aside a stipulation *ex mero motu* without prior notice to the parties:

> Just as a party requesting to set aside a stipulation would have to give notice to the opposing parties, and the opposing parties would have an opportunity for hearing upon the request, the trial court cannot own its own motion set aside a pre-trial order containing the parties' stipulations after the case has been tried in reliance upon that pre-trial order, "without giving the parties notice and an opportunity to be heard."

Id. at 108, 730 S.E.2d at 793 (citation omitted).

Here, even if the trial court intended to set aside the stipulation based upon Wife's counsel's comment about a "marital component" of the $90,000.00 debt, the parties would have needed notice so they could present additional evidence to value the "marital component." Counsel for both parties specifically noted the stipulations of the pretrial order and the trial court never gave any indication of an intent to set aside any of the stipulations. The trial court cannot value the "marital component" of an asset without competent evidence to support marital contribution to the value, and no such evidence was presented.

In *Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E.2d 186 (1985), cited by the dissent, this Court noted that the marital component of separate property is valued based upon the *active appreciation during the marriage*:

---

3. Our dissenting colleague notes that "[t]he trial court certainly could have found that failure to include a $90,000 asset provided sufficient cause to modify the stipulation." But the $90,000.00 is the balance of the debt owed *on the date of separation* and will be paid by Wife after the marriage; it is not a "marital asset." Nor did the parties overlook the $90,000.00 on the pretrial order. Both attorneys pointed out the pretrial order's stipulations to the trial court during the colloquy during Husband's testimony. It was characterized as a debt, the parties agreed on the value, and they disagreed on its classification as a marital or separate debt. The trial court classified it as marital debt, and this classification is not challenged on appeal.

> The Court held that increase in value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property.
>
> We conclude that the real property concerned herein must be characterized as part separate and part marital. It is clear the marital estate invested substantial labor and funds in improving the real property, therefore the marital estate is entitled to a proportionate return of its investment. That part of the real property consisting of the unimproved property owned by defendant prior to marriage should be characterized as separate and that part of the property consisting of the additions, alterations and repairs provided during marriage should be considered marital in nature. As the marital estate is entitled to a return of its investment, defendant because of her contribution of separate property is entitled to a return of, or reimbursement or credit for, that contribution.

Id. at 595-96, 331 S.E.2d at 188 (citations omitted).

The $90,000.00 balance of the debt secured by the townhome cannot equate to a "marital component" because it does not represent active appreciation from "additions, alterations and repairs provided *during marriage*." *Id.* at 595, 331 S.E.2d at 188 (emphasis added). In fact, the $90,000.00 debt balance is just the opposite; this is the principal balance that Wife will be required to pay *after* the marriage, not a contribution *during* the marriage. Only the portion of debt paid *during* the marriage or funds expended on repairs or improvements to the townhome during the marriage could possibly be relevant to a "marital component" of the townhome. Neither party presented any evidence of the initial amount of the loans, payments made during the marriage, reduction of principal during the marriage, or any other factors which may be relevant to a "marital component."[4]

Because the parties had stipulated that the townhome was Wife's separate property and that its value was $186,000.00, the trial court erred by classifying a portion of it as marital and attempting to value it based only upon the balance of a marital debt as of the date of separation. " 'Separate property' of a spouse as defined by G.S. 50-20(b)(2) is not subject to equitable distribution." *Crumbley v. Crumbley*, 70 N.C. App. 143, 145, 318 S.E.2d 525, 526 (1984). In addition, on Schedule H

4. Husband testified only to the amounts of monthly payments and that the loan was refinanced several times.

of the pretrial order, Husband did not make any contention that there was "[a]ny direct contribution to an increase in the value of separate property which occurs during the course of the marriage." In fact, as discussed above, Husband contended the $90,000.00 debt was *not* marital and although he testified to some improvements to the property during the marriage, he also denied that this debt was used to improve the property:

> [Mr. Ferguson:] And this $90,000 loan or $90,000 debt various times was used to make improvements on the property.
>
> [Husband:] Well, –
>
> [Mr. Ferguson:] Yes or no?
>
> [Husband:] *No*, and I'll say -- *the only reason I say that is that that was the balance on the mortgage at the time.* The original mortgage that had been paid down at that time was,I think, 102,000 and the – 'cause we'd been paying an accelerated amount on the principal. We were down to about 90,000.

(Emphasis added.)

The trial court ignored the stipulations and attempted to rely on numbers in the record to create a "marital component" of the townhome. The trial court found, "The tax value on the townhome was $161,190.00 on March 20, 2006. There was no appraisal done on the home at or near the date of separation." These facts are correct, but the tax value of the townhome seven years prior to the date of valuation is irrelevant, and there was no appraisal of the townhome because the parties had *stipulated* to the value. As the trial court also found in finding 5 (e)(1), "Limited documentation was available regarding the marital component." This finding is correct; in fact, there was *no* documentation of a marital component, because neither party contended there was a marital component. Therefore, the trial court's findings of fact regarding the classification of a "marital component" in the townhome and its valuation are not supported by competent evidence.

On appeal, Husband contends that he did present evidence of a "marital component" of the townhome based upon improvements made during the marriage. He acknowledges that the townhome was paid off when the parties married, but argues that during the marriage they incurred debt secured by the townhome and refinanced it more than once. But as noted above, his testimony on this point was contradictory

at best, and he did not present any evidence of the amount of principal paid toward the debt during the marriage or active appreciation in the townhome during the marriage; the only evidence was the debt balance as of the date of separation. He also contends on appeal that "[m]ost of the funds were used to make improvements to the Townhome." Husband did testify at trial about several improvements to the townhome, although he did not present any evidence of the costs of any of the improvements or the sources of funds for each improvement. In addition, there was no evidence of the value of the townhome on the date of the marriage and thus no way for the trial court to determine what portion of an increase in value, if any, was passive appreciation based simply upon the passage of time and increase in overall property values.

But more importantly, the trial court did not make any findings of fact that $90,000.00 debt was actually used to improve the townhome, and Husband did not cross-appeal. Therefore, the trial court's findings regarding the use of the funds are binding on this Court. The only finding regarding the use of a portion of the borrowed funds is:

> [4. d.] 1) . . . On April 10, 2003, Ms. Clemons borrowed $43,130.81 against the property to invest in the trucking business owned by Mr. Clemons before the marriage. The truck was sold in 2007 to purchase the T800 truck.

It was not disputed that the balance of the debt as of the date of separation, $90,000.00, was incurred during the marriage, and based upon the trial court's finding above, almost half of this amount was originally borrowed to invest in Husband's trucking business.[5] Beyond this finding, the trial court classified the $90,000.00 balance of the debt on the townhome as of the date of separation as marital debt. Wife did not challenge this finding on appeal, and Husband did not cross-appeal, so it is binding on this Court. *See Clark*, 236 N.C. App. at 14, 762 S.E.2d at 839.

In finding of fact 6, the trial court listed the valuation and distribution of the marital property. This finding included the townhome, with a marital value of $90,000.00, and distributed it to Wife. This distribution of the townhome is in error because the townhome was Wife's separate property, and there was no "marital component" to include in calculation of the marital estate value or distribution. In finding of fact 7, the trial court listed the amount and distribution of several marital debts.

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5. By the time the parties separated, Husband's trucking business was defunct, so it was not an asset considered in equitable distribution.

The $90,000.00 debt on the townhome was distributed to Wife, and while Wife challenges this distribution in the heading of one of her arguments, she does not make any argument in her brief challenging this classification or distribution. This argument is deemed abandoned. *See* N.C. R. App. P. 28(a). Finding of fact 8 finds that "the gross marital estate is (-)$8,566.62" and divides the marital property and debt equally, resulting in a distributive award from Wife to Husband of $539.31, but this calculation erroneously includes the $90,000.00 value assigned to the "marital component" of the townhome.

In the findings of fact addressing the distributional factors under N.C. Gen. Stat. § 50-20(c)(10), the trial court included findings regarding "[t]he difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact, and free from any claim or interference by the other party." Under this factor, the trial court found:

> 1) The former marital residence was owned by Ms. Clemons prior to the marriage. She mortgaged the property just prior to the marriage to invest in Mr. Clemon's [sic] business. Later the home was mortgaged at least once more for $90,000.00. Limited documentation was available regarding the marital component.
>
> 2) Ms. Clemons resided in the former marital residence prior to the marriage. She continued to live in the home after the date of separation.

Therefore, as part of its determination that an equal division would be equitable, the trial court considered Wife's townhome, the $90,000.00 value of the "marital component" of the townhome, that she had mortgaged it to invest in Husband's business, and that she lived in the townhome both before marriage and after separation. Because we must reverse the trial court's classification and valuation of the "marital component" of the townhome, we also reverse the trial court's division and distribution of the marital property and remand for entry of a new order classifying the townhome as Wife's separate property and equitably distributing the marital property and debt.[6]

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6. We note that the townhome was by far the largest "marital" asset, and the net value of the marital estate without the value of the townhome would be ($98,566.62). This would result in Husband being required to *pay* Wife $44,460.69 to equalize the distribution, a result the trial court may have deemed inequitable.

As in *Turner v. Turner*, by attempting to classify and value a "marital component" of the townhome contrary to the stipulations and evidence and then attempting an equitable result by dividing the net estate equally, "the court put the cart before the horse." 64 N.C. App. 342, 346, 307 S.E.2d 407, 409 (1983). The trial court may in its discretion do equity in the distribution, including an unequal distribution if supported by the factors under N.C. Gen. Stat § 50-20(c), but it may not use equity to classify or value marital property or debt. "Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. A single distributional factor may support an unequal division." *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citation omitted); *see also Watson v. Watson*, ___ N.C. App. ___, ___, 819 S.E.2d 595, 602 (2018).

V. Conclusion

For the foregoing reasons, we reverse and remand for the trial court to enter a new order classifying the townhome as Wife's separate property and distributing the marital property and debts. Since we have reversed the classification and valuation of the most valuable asset included in the marital estate, and the trial court considered this factor as part of its analysis of the distributional factors, we remand for the trial court to reconsider whether "an equal division is not equitable" considering the change in classification of the townhome and net value of the marital estate. N.C. Gen Stat. §50-20(c) (2017). The determination of whether an equal division is not equitable is in the trial court's discretion, and it must exercise its discretion to consider the division in light of this opinion, so the trial court should make additional findings of fact as it deems appropriate as to the distributional factors under N. C. Gen. Stat. §50-20(c). *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." (citations omitted)).

As the classification and valuation of only one asset was challenged on appeal, on remand the parties should not be permitted a "second bite at the apple" by presenting new evidence or argument as to the classification or valuation of marital or divisible property, but in the trial court's discretion, they may present additional evidence addressing the distributional factors under N.C. Gen. Stat. 50-20(c) since the trial court must consider those factors, including "[t]he income, property, and liabilities

of each party at the time the division of property is to become effective." N.C. Gen. Stat. § 50-20(c)(1).

REVERSED AND REMANDED.

Judge DILLON concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

For the reasons stated herein, I respectfully dissent.

The parties stipulated in the pretrial order that the townhome was entirely Wife's separate property, valued at $186,000. Nevertheless, the trial court classified the townhome partially as Wife's separate property and partially marital property because there was active appreciation in the townhome's value during the parties' marriage. The trial court found that the "marital portion" of the townhome was "at least equal to the marital debt of $90,000." Wife contends that the trial court erred by setting aside the parties' stipulation that the townhome was entirely Wife's separate property in order to find that the townhome was subject to a $90,000 "marital component."

However, Wife waived appellate review of this issue by inviting any alleged error. "A party may not complain of action which he induced." *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). Invited error is

> a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining. The evidentiary scholars have provided similar definitions; e.g., the party who induces an error can't take advantage of it on appeal, or more colloquially, you can't complain about a result you caused.

Romulus v. Romulus, 215 N.C. App. 495, 528, 715 S.E.2d 308, 329 (2011) (citation and quotation marks omitted).

Here, the trial court remarked during the trial that there was a "marital portion" of the townhome that was "subject to be distributed." The trial court was not, as the majority contends, addressing the marital debt, but clearly discussing the asset.

> THE COURT: I'll have to decide how the *property's* going to be divided unless she put that on [Schedule] A where they've agreed to that.
>
> [Wife's Attorney]: Her separate property, I believe it's listed under Schedule L.
>
> THE COURT: *There's still a marital portion of it that's subject to be distributed.*
>
> [Wife's Attorney]: *It's a marital component. No dispute.*
>
> THE COURT: Uh-huh.

(Emphasis added.)

By responding that "It's a marital component. No dispute," Wife invited the error, if any. Because any purported error that may have occurred at trial "occurred through the fault of [Wife]," *Romulus*, 215 N.C. App. at 528, 715 S.E.2d at 329, she has waived appellate review of this issue.

Even if Wife had not waived appellate review, the above exchange reflected Wife's consent for the trial court to set aside the parties' stipulation that the townhome was entirely Wife's separate property. Generally, "[a]dmissions in the pleadings and stipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge." *Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E.2d 482, 486 (1971) (citation omitted). However, "[s]tipulations may be set aside in certain circumstances." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 106, 730 S.E.2d 784, 792 (2012).

> It is generally recognized that it is within the discretion of the court to set aside a stipulation of the parties relating to the conduct of a pending cause, where enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by its being set aside. A stipulation entered into under a mistake as to a material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief. Other proper justifications for setting aside a stipulation include: misrepresentations as to material facts, undue influence, collusion, duress, fraud, and inadvertence.

Lowery v. Locklear Const., 132 N.C. App. 510, 514, 512 S.E.2d 477, 479 (1999) (citations and quotation marks omitted).

> Although it may be appropriate for a trial court on its own motion to set aside a parties' stipulation for one of the reasons stated in *Lowery* or to prevent manifest injustice, there are limits to the court's discretion to set aside a stipulation. First, Rule 16(a)(7) [of the North Carolina Rules of Civil Procedure] itself states that a stipulation may be "modified *at the trial* to prevent manifest injustice." N.C. Gen. Stat. § 1A–1, Rule 16(a) (emphasis added). Modification of a stipulation *at the trial* gives all parties immediate notice of the modification and allows the parties the opportunity to present additional evidence which may be required based upon the elimination of the stipulation.

Plomaritis, 222 N.C. App. at 107, 730 S.E.2d at 793 (emphasis in original).

Here, the majority opinion implies that the trial court made an *ex mero motu* post-trial modification to the parties' stipulation. However, to the extent there was any modification, it was made *at trial* and with Wife's consent. The majority opinion's failure to make a distinction between stipulation modifications that occur during trial and post-trial is essential because it relates to the parties' right to notice and opportunity to be heard.

The trial court certainly could have found that failure to include a $90,000 asset provided sufficient cause to modify the stipulation.[1] Given the evidence in the record, the trial court correctly concluded that the townhome should have been classified and distributed as part separate and part marital property due to its active appreciation during the marriage. *See Lawrence v. Lawrence*, 75 N.C. App. 592, 595 331 S.E.2d 186, 188 (1985) ("Part of the real property consisting of the unimproved property owned by defendant prior to marriage should be characterized as separate and that part of the property consisting of the additions,

1. The majority's footnote 3 is curious given the very straightforward language contained herein. The trial court found that the "marital portion" of the townhome was "at least equal to the marital debt of $90,000." The trial court valued this *asset*, the active appreciation of the townhome, at $90,000. While the trial court's valuation of both the marital debt on the townhome and the active appreciation in the townhome's value at $90,000 has apparently caused some confusion, this dissent does not address in any way, shape, or fashion the trial court's valuation or distribution of the $90,000 *debt* owed on that asset.

alterations and repairs provided during marriage should be considered marital in nature."). Moreover, the trial court immediately notified the parties during the trial that it believed the townhome was subject to a marital component of active appreciation.

In addition, one could argue that there was evidence that could support the trial court's valuation of the "marital portion" of the townhome. Prior to the marriage, Wife purchased and paid off the mortgage on the townhome. During the marriage, the parties lived in the townhome and took out multiple lines of credit against the equity on the townhome. Defendant testified that the parties spent most of the loan proceeds to remodel and make improvements to the townhome. Wife did not dispute this testimony.

Admittedly, the trial court's findings as to valuation of the townhome are limited. But, evidence in the record demonstrates that there was active appreciation of separate property. Additional findings of fact from the trial court could resolve this issue, as could additional evidence if the trial court deems necessary. This Court should not hamstring a trial court by simply instructing it to "get it over," instead of getting it right.

CRYSTAL COGDILL AND JACKSON'S GENERAL STORE, INC., PLAINTIFFS
v.
SYLVA SUPPLY COMPANY, INC., DUANE JAY BALL AND IRENE BALL, DEFENDANTS

No. COA18-845

Filed 7 May 2019

Landlord and Tenant—holdover tenancy—expired lease—right of first refusal

Where plaintiffs became holdover tenants on defendant's property after the parties' written lease expired, plaintiffs' year-to-year tenancy created by operation of law did not include the right of first refusal (to purchase the property, if defendant chose to sell it) contained in the expired lease. By its own terms, the written lease could not be extended beyond a certain date and, therefore, plaintiffs could not enforce their right of first refusal past that date. Moreover, nothing in the lease's language indicated that the parties intended the right of first refusal to remain in force beyond any extension or holdover period.

Judge TYSON dissenting.

Appeal by Plaintiffs from order entered 16 April 2018 by Judge Mark E. Powell in Jackson County Superior Court. Heard in the Court of Appeals 31 January 2019.

The Law Firm of Diane E. Sherrill, PLLC, by Diane E. Sherrill, for Plaintiffs-Appellants.

Coward, Hicks, & Siler, P.A., by Andrew C. Buckner, for Defendants-Appellees.

COLLINS, Judge.

Plaintiffs appeal the trial court's order granting summary judgment in favor of Defendants as to Plaintiffs' action alleging seven claims, including breach of contract. Plaintiffs' claims all stem from their assertion that they possessed a valid and enforceable Right of First Refusal to purchase the property at issue at the time Defendant Sylva Supply Company, Inc., conveyed the property to Defendants Duane Jay and Irene Ball. Plaintiffs and Sylva had entered into a written lease agreement, which was subsequently assigned to Plaintiff Jackson's General Store, Inc., which contained a Right of First Refusal. However, the written lease had expired and, pursuant to this Court's opinion in *Ball v. Cogdill*, COA17-409, 2017 N.C. App. LEXIS 1074 (N.C. Ct. App. December 19, 2017) (unpublished), Plaintiffs were holdover tenants under a year-to-year tenancy created by operation of law. The question posed by this appeal is whether the year-to-year tenancy created by operation of law included the Right of First Refusal contained in the expired written lease. We hold that it did not.

I. Procedural History and Factual Background

On 19 May 1999, Crystal Cogdill[1] (Cogdill) and Sylva Supply Company, Inc. (Sylva), entered into a "Buy-Sell and Lease Agreement" (Original Lease) by which Sylva leased the building located at 582 West Main Street (Property) to Cogdill. The lease was for a period of five years and included an option to renew for a single, additional period of five years. To exercise the option to renew, Cogdill had to provide written notice to Sylva no later than thirty days before the expiration of the first, five-year period. The renewal terms were to be determined at

1. Then Crystal Cogdill Jones.

the time of renewal; however, the terms of the renewed lease were to be determined by the parties at least ninety days before the expiration of the first, five-year lease period.[2] The first, five-year period expired on 31 May 2004.

The Original Lease granted Cogdill a Right of First Refusal to purchase the Property, should Sylva wish to sell the Property. Sylva was required to notify Cogdill by certified mail of the option to purchase the Property at the lowest price and on the same terms and conditions Sylva was willing to accept from other purchasers. If, within fifteen days of receiving Sylva's offer, Cogdill did not mail Sylva notice that she intended to exercise her Right of First Refusal to purchase the Property, Sylva had the right to sell the Property to other purchasers.

On 1 June 1999, a "Memorandum of Lease and Right of First Refusal" memorializing the Original Lease was recorded in the Jackson County Public Registry. On 1 July 1999, Cogdill assigned the Original Lease to Jackson's General Store, Inc. (Jackson's), a business incorporated by Cogdill.

On 7 June 2001, Cogdill and Sylva executed an "Amendment to Lease Agreement" (Lease), which amended the original rental period from five years to seven years and, thus, extended the original rental period end date from 31 May 2004 to 31 May 2006. If Sylva opted to renew the Lease for an additional, seven-year period, the new rental period would run from 1 June 2006 to 31 May 2013. The amendment also modified the amount of rent to be paid. All other terms remained unmodified.

No written notice was given to renew the Lease beyond the expiration of the initial seven-year period, which ended 31 May 2006. However, Plaintiffs continuously remained in tenancy.

On 7 May 2015, without first giving Plaintiffs an option to the buy the Property, Sylva sold the Property to Duane Jay and Irene Ball (the Balls). In June 2016, the Balls instituted a summary ejectment action against Plaintiffs. Both the small claims court and district court ruled in favor of Plaintiffs and dismissed the action. The Balls appealed to the Court of Appeals.

While the appeal was pending, Plaintiffs filed the complaint in the present action. In the complaint, Plaintiffs alleged causes of action for breach of contract, fraud, constructive fraud, civil conspiracy, claim to set aside deed, tortious interference with contract, and unfair and

2. The apparent internal incongruency of this term has no significance in this appeal.

deceptive acts or practices. These claims were based on Plaintiffs' assertion that they were wrongfully denied the right to exercise their Right of First Refusal to purchase the Property. Plaintiffs also filed a notice of *lis pendens*.

On 8 September 2017, Defendants moved to dismiss the complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 19 December 2017, this Court issued *Ball v. Cogdill*,[3] holding as follows: "Where [Cogdill and Jackson's] remained in tenancy after the expiration of their lease, the lease became a year-to-year tenancy. Because [the Balls] failed to provide the necessary 30 days' notice, the trial court did not err in denying [the Balls'] summary ejectment complaint." *Id.* at *1.

On 24 January 2018, Defendants filed an amended motion to dismiss, citing this Court's opinion in *Ball* as further support for dismissal. On 19 February 2018, Plaintiffs filed a motion for partial summary judgment, also citing this Court's opinion in *Ball* as support for its motion.

The trial court heard Defendants' original motion to dismiss, but did not consider this Court's opinion in *Ball*, and entered an order on 12 March 2018 denying the motion. On 16 March 2018, Defendants filed an answer to Plaintiffs' motion for partial summary judgment and raised the doctrine of collateral estoppel as a defense to Plaintiffs' claims.

On 2 April 2018,[4] the trial court heard Plaintiffs' motion for partial summary judgment and Defendants' amended motion to dismiss. Defendants' motion was converted to a motion for summary judgment because the trial court considered the Court of Appeals' opinion in *Ball*, a matter outside the pleadings. On 16 April 2018, the trial court entered its order denying Plaintiffs' motion for partial summary judgment and granting Defendants' motion for summary judgment. From this order, Plaintiffs appeal.

II. Jurisdiction

The trial court's 16 April 2018 order granting Defendants' motion for summary judgment was a final judgment. Jurisdiction of this appeal

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3. The Balls were the plaintiffs while Cogdill and Jackson's were the defendants in the summary ejectment action. The parties' roles are reversed on this appeal. Sylva was not a party.

4. The order states that this cause of action was "heard before the undersigned judge presiding over the March 26, 2018 civil session of the Superior Court of Haywood County[.]" However, both parties stipulated that the "Order appealed from was the result of a hearing held during the April 2, 2018 civil session of the Superior Court of Haywood County[.]"

is therefore proper under N.C. Gen. Stat. § 7A-27(b)(1) (2018) and N.C. Gen. Stat. § 1-271 (2018).

III. Discussion

A. Court of Appeals' opinion in Ball v. Cogdill

We begin this discussion with a summary of this Court's opinion in *Ball v. Cogdill*, which involved the same background facts and the same parties, except Sylva, as the case presently before us. In *Ball*, this Court rejected the Balls' argument that the trial court erred by denying their complaint for summary ejectment because the trial court erroneously concluded that Cogdill and Jackson's were under a lease when the Balls attempted to summarily evict them from the Property. This Court noted, and Cogdill and Jackson's conceded, that no written notice had been given to renew the Lease beyond the expiration of the first, seven-year period. *Id.* at *4. This Court explained, however, that the "failure to renew a lease does not automatically result in ejectment of a tenant." *Id.* The record reflected that Cogdill and Jackson's had "remained in tenancy" after the expiration of the Lease and paid rent every month to the Balls, and the Balls had accepted the payment. *Id.* at *5-6. Citing our Supreme Court's opinion in *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966), this Court concluded the Lease had thus become a year-to-year tenancy created by operation of law, terminable by either party upon giving the other thirty days' notice directed to the end of the year of such new tenancy. *Id.* at *5. As the Balls had failed to give Cogdill and Jackson's the requisite thirty days' notice before demanding they vacate the Property, the Balls could not summarily eject Cogdill and Jackson's after they refused to vacate. *Id.* at *6.

B. Present Appeal

The parties agree that, pursuant to *Ball*, Plaintiffs were under a year-to-year tenancy created by operation of law when Sylva sold the Property to the Balls.[5] The parties disagree, however, as to the legal import of the *Ball* decision regarding the Right of First Refusal contained in the written Lease. Plaintiffs argue that all of their rights and duties under the Lease, including their Right of First Refusal, continued in effect after the Lease expired and became a year-to-year tenancy created by operation of law. Defendants argue that following the expiration of the written Lease, the Right of First Refusal did not become part of the new year-to-year tenancy created by operation of law. Thus, the issue before us is

5. The parties each argue the doctrine of collateral estoppel to support this shared conclusion.

whether the year-to-year tenancy created by operation of law included the Right of First Refusal contained in the written Lease. We hold that it did not.

C. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018). The standard of review of an appeal from summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

D. Analysis

When a lease for a fixed term of a year, or more, expires, a tenant holds over, and "the lessor elects to treat him as a tenant, a new tenancy relationship is created as of the end of the former term." *Kearney v. Hare*, 265 N.C. 570, 573, 144 S.E.2d 636, 638 (1965). "This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease in so far as they are applicable . . . ." *Id.* Our appellate courts have not squarely addressed whether a right of first refusal, which "creates in its holder . . . the right to buy land before other parties if the seller decides to convey it[,]" *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980), is a term "applicable" to a year-to-year tenancy created by operation of law after the expiration of a written lease. Our appellate courts have, however, addressed this issue in the context of an option to purchase property in a written lease agreement. *Id.* (explaining that a right of first refusal is analogous to an option to purchase, which creates in its holder the power to compel sale of land).

This Court concluded in *Vernon v. Kennedy*, 50 N.C. App. 302, 273 S.E.2d 31 (1981), that an option in the written lease to purchase the leased property could not be construed as "applicable" to the tenancy from year to year created by operation of law. *Id.* at 304, 273 S.E.2d at 32. The one-year lease in *Vernon* included an option to extend the lease for an additional, one-year period. The lease thus provided, "at an absolute maximum, for a term of two years" and could not remain "in force after 30 April 1973." *Id.* at 303, 273 S.E.2d at 32. The lease also included an option for plaintiffs to purchase the property "at any time during the term of this lease or extended period thereof . . . ." *Id.*

On 21 November 1979, plaintiffs in *Vernon* brought an action for specific performance of the option to purchase contained in the written lease. This Court explained that upon the expiration of the written lease, a new tenancy relationship had been created by operation of law, and thus, plaintiffs "were at best tenants from year to year under the applicable terms of the expired lease." *Id.* This Court held that the option to purchase could not be construed as "applicable" to the tenancy from year to year because by its own terms, the option was "limited to 'the term of this lease or the extended period thereof.' " *Id.* at 304, 273 S.E.2d at 32 (quoting the contract at issue). "Since the lease, again by its own terms, could not be extended beyond 30 April 1973, an attempt to exercise the option in 1979 would come outside the extended term of the lease." *Id.*

A similar result was reached in *Hannah v. Hannah*, 21 N.C. App. 265, 204 S.E.2d 212 (1974), where this Court held that defendant's obligation under a written lease to purchase plaintiff's stock and equipment at the end of the lease did not remain in effect throughout the period the plaintiff was permitted to hold over after the expiration of the lease. *Id.* at 267, 204 S.E.2d at 214. By written agreement, defendant leased his filling station to the plaintiff for a five-year period and agreed that " '[i]f at the end of five years, [defendant] should want possession of said filling station,' he would 'purchase all stock and equipment at 20% discount . . . .' " *Id.* Defendant did not want possession at the end of five years, but permitted plaintiff to hold over and remain in possession as his tenant for more than fifteen additional years. *Id.* When defendant proposed to raise plaintiff's rent, plaintiff demanded that defendant comply with the provisions of the lease agreement to purchase the stock and equipment. Defendant refused.

On appeal, this Court looked at the "express language of the original lease [which] brought the purchase agreement into play only if 'at the end of five years,' the landlord should want possession." *Id.* at 267-68, 204 S.E.2d at 214. As the original lease term was also for a period of five years, "obviously the parties contemplated the possibility that there might be a holding over or an extension after the initial five-year term, but nothing in the language indicate[d] that the parties intended the purchase obligation to remain in effect throughout whatever holdover or extended period might occur." *Id.* Accordingly, this Court held "that defendant's obligation to purchase as contained in the . . . written agreement was no longer in effect when, more than twenty years thereafter, he was called upon to fulfill it." *Id.* at 268, 204 S.E.2d at 214.

In a slightly different factual scenario, the Court in *Davis v. McRee*, 299 N.C. 498, 263 S.E.2d 604 (1980), concluded that an option to purchase

was incorporated into an express extension of an original lease. The parties entered into a written, one-year lease agreement, which contained an option for defendants to purchase the property during the lease period. When the agreement expired on 31 January 1974, defendants continued in tenancy and continued to make rental payments until 13 August 1974. On that date, the parties met and added the following language to the end of the original lease agreement: "The term of this lease shall be from Jan. 31, 1974 through Jan. 31, 1976." *Id.* at 500, 263 S.E.2d at 605.

In the fall of 1975, defendants indicated their intention to exercise the option to purchase. They arranged to borrow the purchase money, and plaintiffs executed a deed to the property. The parties ultimately disagreed on the sale price, and plaintiffs instituted an action to cancel the deed. In court, plaintiffs argued that the option to purchase had died with the expiration of the term of the original lease and that the new agreement was not effective to revive the option. *Id.* at 501, 263 S.E.2d at 606. Our Supreme Court noted, "Where the parties have made a separate agreement extending the lease, the agreement must be examined in light of all the circumstances in order to ascertain the meaning of its language, with the guide of established principles for the construction of contracts, and in the light of any reasonable construction placed on it by the parties themselves." *Id.* at 502, 263 S.E.2d at 606-07 (quotation marks and citation omitted). The Court held it was "evident from the conduct of the parties here that they intended to incorporate the option to purchase in their August agreement to extend the lease." *Id.* at 503, 263 S.E.2d at 607.

As in *Vernon* and *Hannah*, Defendants' obligation to offer Plaintiffs the Right of First Refusal to purchase the Property was not applicable to the year-to-year tenancy created by operation of law, and did not remain in effect throughout the period in which Plaintiffs were permitted to hold over after the expiration of the Lease. By written agreement, the Lease expired by its express terms on 31 May 2006, unless timely renewed for a second, seven-year period. Prior to the expiration of the Lease on 31 May 2006, Plaintiffs failed to timely exercise their option to renew the Lease for a second, seven-year period. Additionally, prior to the expiration of the Lease on 31 May 2006, Plaintiffs did not exercise their Right of First Refusal as Defendants did not desire to sell the Property. Moreover, even if timely notice to renew had been given, the Lease provided, at an absolute maximum, for a period of fourteen years and could not remain in force after 31 May 2013.

As in *Vernon*, upon the expiration of the written Lease, a new tenancy relationship was created by operation of law, and thus, Plaintiffs

were tenants from year to year under the applicable terms of the expired lease. *Ball* at *5. Although the Right of First Refusal clause itself does not specifically reference the Lease expiration dates, the Lease by its own terms could not be extended beyond 31 May 2013. Thus, an attempt to enforce the Right of First Refusal in 2015 "would come outside the extended term of the lease." *Vernon*, 50 N.C. App. at 304, 273 S.E.2d at 32.

Moreover, unlike in *Davis*, the parties in this case did not expressly extend the Lease after its expiration and Plaintiffs' attempt to exercise their Right of First Refusal was not made during such extended term, but was made nine years after the Lease's expiration. Furthermore, while the parties' conduct in *Davis* evidenced an intent to incorporate the purchase option into the express extension of the lease agreement, the parties' conduct in entering into the Lease in this case did not. The terms of the Lease specifically did not provide for incorporation of the Right of First Refusal as the renewal terms were to be determined by the parties at least ninety days before the expiration of the first, seven-year lease period. *See Hannah*, 21 N.C. App. at 268, 204 S.E.2d at 214 ("nothing in the language indicate[d] that the parties intended the purchase obligation to remain in effect throughout whatever holdover or extended period might occur").[6] Accordingly, Defendants' obligation to offer Plaintiffs the Right of First Refusal contained in the written Lease was no longer in effect when, approximately nine years thereafter, they were called upon to do so. *See Vernon*, 50 N.C. App. at 304, 273 S.E.2d at 32; *Hannah*, 21 N.C. App. at 268, 204 S.E.2d at 214; *see also Atlantic Product Co. v. Dunn*, 142 N.C. 471, 471, 55 S.E. 299, 300 (1906) (holding that an option to renew a lease or purchase property contained in a written lease can "be exercised only while the lease was in force"); *Smyth v. Berman*, 242 Cal. Rptr. 3d 336 (Cal. App. 5th 2019) (holding that a right of first refusal contained in an expired written lease was not an essential term which carried over into the holdover tenancy); *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1185 (Del. Ch. 2005) (holding that a right of first refusal in a lease agreement does not presumptively carry over into a holdover tenancy).

This result is supported by the public policy purposes that statutory and common law holdover tenancies were generally created to

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6. The dissent's analysis relies upon testimonial evidence contained in a transcript from a prior case, concerning a different issue, before this Court. That transcript is not part of this record on appeal. Our "review is solely upon the record on appeal, the verbatim transcript of proceedings . . ., and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a) (2018).

address, as explained by Vice Chancellor Strine of the Court of Chancery of Delaware:

> Historically, in our legal tradition, when tenants continued to occupy property beyond the expiration of a lease, landlords were entitled to treat holdover tenants as trespassers, or to summarily evict them. The doctrine of 'self-help' arose in the interest of landlords and incoming tenants, allowing landlords to promptly recover possession of leased property from tenants who held it improperly. Not surprisingly, widespread use of 'self-help' remedies led to concerns for the endangerment of persons and property, and breaches of the peace. Statutory [and common law] holdover tenancies emerged as a means of protecting tenants from self-help by landlords who were legally entitled to treat them as trespassers -- that is, to keep people from being dumped out on the street. [Holdover tenancies] attempt to maintain the status quo of a tenant's occupancy and use of leased property for a short period of time during which a landlord can pursue summary eviction. This approach balances the policy objectives of permitting landlords and incoming tenants to recover possession of property in a timely fashion and permitting outgoing tenants to move out in an orderly manner, thereby 'improving the prospects for preserving the public peace.'

Bateman, 878 A.2d at 1182-83. "Holdover tenancies are therefore not intended to prolong the existence of legal rights between the landlord and tenant, such as rights of first refusal, that are otherwise unrelated to occupancy and use of property." *Id.* at 1183. Moreover, "[u]nlike an option to purchase property, which an option holder can proactively exercise, a right of first refusal can be exercised only when the holder of property entertains an offer from a third party to purchase the property." *Id*. at 1183-84. Thus, "the extension of a right of first refusal beyond the termination of the contract that conveyed that right makes little sense, given the ease with which the exercise of such a right could be frustrated." *Id*. at 1184.

> If a right of first refusal presumptively carried forward into a holdover tenancy, a landlord wishing to nullify that right could easily do so by evicting the holdover tenant and selling the property one day later, both of which would be within its rights as the landlord of a holdover tenant. This creates an incentive for landlords to evict holdover

> tenants as soon as possible [], a result at odds with the stability of commercial tenancies. The contrary rule that carries such purchase options forward only if the parties so specify avoids this result, thereby making holdover tenancies more stable.

Smyth, 242 Cal. Rptr. 3d at 345 (internal quotation marks and citation omitted).

Plaintiffs cite no authority for their assertion that the Right of First Refusal provided under the Lease continued in effect when Plaintiffs failed to renew the Lease and continued to inhabit the Property as holdover tenants on a year-to-year basis, beyond *Ball's* inclusion of this quote from *Coulter v. Capitol Fin. Co.*:

> "Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, or he may recognize him as still a tenant, *having the same rights and duties as under the original lease*, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy."

Ball at *4-5 (quoting *Coulter*, 266 N.C. at 217, 146 S.E.2d at 100) (emphasis added). However, *Coulter* relied on *Kearney v. Hare*, cited above, which more precisely explains that when a lease for a fixed term of a year, or more, expires, a tenant holds over, and "the lessor elects to treat him as a tenant, a new tenancy relationship is created as of the end of the former term." *Kearney*, 265 N.C. at 573, 144 S.E.2d at 638. "This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease in so far as they are applicable . . . ." *Id.*

To be sure, there is precedent from several states holding that rights of first refusal (or other purchase options) presumptively carry forward into holdover tenancies. *See Smyth*, 242 Cal. Rptr. 3d at 345 (listing cases discussing presumptive rights and options in holdover tenancies). However, the majority rule is the rule supported by our case law and general policy that we apply today. *See id.* The Right of First Refusal in this case was not "applicable" to the year-to-year tenancy created by operation of law after the expiration of the Lease.

IV. Conclusion

For the reasons stated above, the Right of First Refusal in the written Lease was not a term applicable to the year-to-year tenancy created by operation of law upon the expiration of the written Lease. Accordingly, Plaintiffs were not entitled to be given the Right of First Refusal to purchase the Property prior to Sylva's sale of the Property to the Balls. Because of our holding, we need not reach Plaintiffs' argument that the Right of First Refusal did not violate the rule against perpetuities. As there was no genuine issue of material fact and Defendants were entitled to judgment as a matter of law, the trial court's order granting summary judgment in favor of Defendants is affirmed.

AFFIRMED.

Judge ZACHARY concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously concludes as a matter of law the tenant's right of first refusal to purchase the property, included in the original lease between Plaintiffs and Defendant Sylva Supply Co. Inc., is not a term or provision that is applicable to or enforceable by Plaintiffs' during their year-to-year tenancy. The trial court's grant of summary judgment in favor of Defendants is error. Whether the Plaintiffs' right of first refusal in this case applies to the year-to-year tenancy or is a wholly independent, stand-alone agreement between the parties, rests upon the intent of the parties and raises genuine issues of material fact. Summary judgment is inappropriate in this circumstance. I vote to reverse the trial court's order and remand for a trial on the merits. I respectfully dissent.

I. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003) (citation omitted).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and internal quotation marks omitted). Defendants cannot meet this standard.

II. Right of First Refusal

The parties are operating under a year-to-year tenancy, pursuant to this Court's holding in *Ball v. Cogdill*, __ N.C. App. __, 808 S.E.2d 617, 2017 N.C. App. LEXIS 1074 (2017) (unpublished). Our Supreme Court has stated that when a landlord continues to accept rent from a tenant after the express term of the lease expires, a tenancy from year-to-year is created, "the terms of which are the same as those of the former lease in so far as they are applicable, in the absence of a new contract between them or of other circumstances rebutting such presumption." *Kearney v. Hare*, 265 N.C. 570, 573, 144 S.E.2d 636, 638 (1965).

The majority's opinion concludes a right of first refusal is not an "applicable" term of the lease as a matter of law to affirm summary judgment. Based upon controlling North Carolina contract law and cases involving option and first refusal contracts, the intent of the parties is a question of fact and summary judgment is inappropriate in this case. On the merits and as a question of law, a review of jurisdictions which have ruled on this issue supports a conclusion that a right of first refusal survives and applies in year-to-year tenancies.

A. North Carolina Law

A right of first refusal is a preemptive right, which "creates in its holder only the right to buy land before other parties if the seller decides to convey it." *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980). Though distinguishable from a unilateral option contract, our Supreme Court has held review of preemptive rights and options can be analogous. *Id.* at 63, 269 S.E.2d at 612 ("Just as the commercial device of the option is upheld, if it is reasonable, so too the provisions of a preemptive right should be upheld if reasonable, particularly here where

the preemptive right appears to be part of a commercial exchange, bargained for at arm's length."). The right of first refusal can be an express, unitary agreement or can be contained within a lease, option, covenant, or other agreement.

"[T]he same principles of construction applicable to all contracts apply to option contracts." *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001). If the terms of the contract are clear, the contract "must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics, Inc. v. Newton Car Wash, Inc.*, 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981). "Where the language of a contract is ambiguous, courts consider other relevant and material extrinsic evidence to ascertain the parties' intent[.]" *Lagies*, 142 N.C. App. at 247, 542 S.E.2d at 342.

Ambiguous terms are conditions or provisions that are "fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). In reviewing and construing contracts, ambiguous terms are to be "construed against the drafting party." *Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342.

The majority's opinion erroneously purports to base the outcome of this case on *Vernon v. Kennedy*, 50 N.C. App. 302, 273 S.E.2d 31 (1981), and *Hannah v. Hannah*, 21 N.C. App. 265, 204 S.E.2d 212 (1974). Neither of those cases are applicable to the facts before us nor are controlling to the outcome of this case.

Vernon construed an option to purchase, as opposed to a right of first refusal, whose express and explicit terms stated the right could not be construed to survive expiration of the lease term or be "applicable" to the subsequent year-to-year tenancy:

> The option term in paragraph 7 of the lease cannot be construed as "applicable" to the tenancy from year to year *for the reason that by its own terms, paragraph 7 is limited to 'the term of this lease or the extended period thereof*.' Since the lease, again by its own terms, could not be extended beyond 30 April 1973, an attempt to exercise the option in 1979 would come outside the extended term of the lease.

Vernon, 50 N.C. App. at 304, 273 S.E.2d 32 (emphasis supplied).

The issue presented in *Hannah* was similar. A lease of a filling station included the provision: "If at the *end of five years*, [the tenant] should

want possession of said filling station, he would purchase all stock and equipment at 20% discount, and not over 2 years bills." *Hannah*, 21 N.C. App. at 267, 204 S.E.2d at 214 (internal quotation marks omitted) (emphasis supplied). The tenant remained in possession of the premises for over *fifteen years after* the lease expired. *Id.* at 267, 204 S.E.2d at 214. This Court held that the express term "at the end of five years" could not be construed to include the end of any renewal or extension, and the obligation to purchase was extinguished. *Id.* at 268, 204 S.E.2d at 214.

Unlike in *Vernon* and *Hannah*, neither the right of first refusal paragraph in Plaintiffs' lease nor the "Memorandum of Lease and Right of First Refusal" ("Memorandum") contain any express limitation restricting the right to a specific term or event. Paragraph XI states that if the landlord desires to sell the property "it shall offer" the option to purchase to the tenant. The majority's opinion asserts the terms of the lease restrict the right of first refusal to the dates of the lease and one additional seven year extension. Without express language limiting the applicability of the right of first refusal upon the expiration of the lease as in *Vernon* or to a specific time as in *Hannah*, the applicability of the right is, at minimum, ambiguous.

The Memorandum states:

> The undersigned hereby declare that they have entered into a Lease *and* Right of First Refusal Agreement dated May 19, 1999, which contains a right of first refusal conveyed by Sylva Supply Company, Inc. to Crystal Cogdill Jones, upon the property located at 582 West Main Street, Sylva, North Carolina, known as the Sylva Supply Company Building.
>
> The undersigned further state that the written instrument of lease *and* right of first refusal and any amendments thereto will be kept for safekeeping at the office of Sylva Supply Company, Inc. . . .

(Emphasis supplied). This written Memorandum is express in its terms and meets all the requirements of the Statute of Frauds for "the party to be charged." N.C. Gen. Stat. § 22-2 (2017). At minimum, genuine issues of material fact exist on the intent of the parties of the provisions and Memorandum.

The majority's opinion purports to distinguish our Supreme Court's holding in *Davis v. McRee*, 299 N.C. 498, 263 S.E.2d 604 (1980), though

the facts of that case are clearly more applicable here than either *Vernon* or *Hannah*. The majority opinion's analysis hinges upon the parties in *Davis* having retroactively extended their lease beyond the original term after a holdover, and attempted to exercise their option to purchase during that retroactively extended renewal term. However, the terms of the lease in *Davis* were deemed to be ambiguous, and our Supreme Court's analysis of how to construe ambiguous option terms is instructive and controlling here:

> *[T]he ultimate test in construing any written agreement is to ascertain the parties' intentions in light of all the relevant circumstances and not merely in terms of the actual language used.*
>
> . . .
>
> The parties are presumed to know the intent and meaning of their contract better than strangers, and where the parties have placed a particular interpretation on their contract after executing it, the courts ordinarily will not ignore that construction which the parties themselves have given it prior to the differences between them.

Davis, 299 N.C. at 502, 263 S.E.2d at 606-07 (emphasis supplied).

Our Supreme Court in *Davis* looked to the actions of the parties because the Court deemed the language and applicability of the lease extension to be ambiguous. *Id.* at 502-03, 263 S.E.2d 607. The subsequent actions of both parties indicated their intention to abide by and extend the option: the defendants exercised their option and the plaintiffs had the deed of purchase drawn up. *Id.*

Here, the terms of the lease and the signed and recorded Memorandum, viewed in the light most favorable to Plaintiffs, are ambiguous, as there is no expressed limitation on or termination of the right of first refusal. We also take judicial notice of subsequent behavior by parties, which also suggests the recorded right of first refusal survived the expiration of the lease, with or without the year-to-year tenancy, and shows ambiguity. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2017) (a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" can be judicially noticed "at any stage of the proceeding"); *see also West v. Reddick, Inc.*, 302 N.C. 201, 202-03, 274 S.E.2d 221, 223 (1981) ("This Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the

issues are the same and the interrelated case is referred to in the case under consideration . . . . on any occasion where the existence of a particular fact is important, as in determining the sufficiency of a pleading").

As noted in the record when this case was previously before this Court, Sylva Supply Company, Inc., provided Ms. Cogdill with an opportunity to purchase the property during the year-to-year tenancy in 2012, though the transaction did not close. This proffer indicates the owner/landlord's recognition of the continued viability and its intent to continue honoring the tenant's express right of first refusal, either as stated in the lease or the recorded Memorandum. However, the 2015 sale of the property that is before us, closed without seller-landlord offering Plaintiffs the first refusal to exercise their right to purchase the property, which injects ambiguity into the intent and actions of the parties.

Further, W. Paul Holt, Jr., the attorney who drafted the original lease, amendment, and recorded Memorandum, and maintained possession of the lease in his office, was also the closing attorney and drafted the 2015 deed for the sale of the property to the Balls. This deed warrants the premises were free from all encumbrances on 7 May 2016. Not only are ambiguous terms construed against the drafter, *see Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342, the lease is also construed against the original drafter's successor-in-interest. *See Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 525, 389 S.E.2d 576, 584 (1990).

The ambiguity present in the language of the contract, in the express language contained in the Memorandum, and in the subsequent actions of the parties presents and shows genuine issues of material fact exist, which precludes disposition of this case by summary judgment. *See Pacheco*, 157 N.C. App. at 447, 579 S.E.2d at 507. The trial court's order is properly reversed.

B. Other Jurisdictions

The genuine issues of material facts of the parties' intent existing in this case do not require a determination on whether rights of first refusal are "applicable" terms under a year-to-year lease. The express terms and provisions of the signed and recorded Memorandum preclude summary judgment for Defendants. I also disagree with the majority opinion's analysis of how North Carolina law determines this issue.

The majority's opinion cites a purported "majority" rule, which holds the right of first refusal presumptively does not carry forward, as the rule that is supported by North Carolina case law and general public policy. A closer reading of states which have decided this issue indicates North Carolina does not agree with nor follow their decisions.

The majority's opinion cites *Smyth v. Berman*, 242 Cal. Rptr. 3d 336 (Ct. App. 2 Dist. 2019), which provides a survey of states that have ruled on the issue of whether rights of first refusal carry forward into holdover tenancies after the lease term expires. *Id.* at 345-46. The opinion in *Smyth* characterizes North Carolina as part of the "majority" rule, based upon the ruling in *Vernon*. As discussed above and in other jurisdictions, *Vernon* is distinguishable "based on . . . [the court's] interpretation of the particular [and express] lease terms presented." *Kutkowski v. Princeville Prince Golf Course, LLC*, 289 P.3d 980, 992 (Haw. Ct. App. 2012), *rev'd on other grounds*, 300 P.3d 1009 (Haw. 2013); *see also Peter-Michael, Inc. v. Sea Shell Assocs.*, 709 A.2d 558, 563 & n.6 (Conn. 1998).

Kutkowski held that "[w]hen a lease for a specified term is not extended or renewed, and the lessee holds over after the expiration of the lease, *unless otherwise agreed*, the law implies that the parties' rights and obligations with respect to that holdover tenancy continue as set forth in the expired lease agreement." *Id.* at 994 (emphasis supplied). This principle "states the common law followed in Hawai'i and most every other jurisdiction surveyed, and sets forth the common understanding and rules applicable to the dealings of landlord and tenant after the termination of their express agreement, but effectuates, as the law must, the parties' right to agree to the contrary." *Id.* This analysis and conclusion follows the common law of our state. *See Kearney*, 265 N.C. at 573, 144 S.E.2d at 638; *see also Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966).

The majority's opinion from this "error correcting court" cites *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1183 (Del. Ch. 2005), to explain the purported "public policy" reasons behind its holding. The Chancery Court of Delaware noted that

> Statutory holdover tenancies emerged as a means of protecting tenants from self-help by landlords who were legally entitled to treat them as trespassers – that is, to keep people from being dumped out on the street. Statutes such as § 5108 attempt to maintain the status quo of a tenant's occupancy and use of leased property for a short period of time during which a landlord can pursue summary eviction. This approach balances the policy objectives of permitting landlords and incoming tenants to recover possession of property in a timely fashion and permitting outgoing tenants to move out in an orderly manner, thereby "improving the prospects for preserving the public peace." Holdover tenancies are therefore not

> intended to prolong the existence of legal rights between the landlord and tenant, such as rights of first refusal, that are otherwise unrelated to occupancy and use of property.

Id. at 1183. For lease terms of a year or more in Delaware, the holdover "term shall be month-to-month, and all other terms of the rental agreement shall continue in full force and effect." Del. Code Ann. tit. 25, § 5108 (2009).

Similarly, California courts also declined to presumptively extend the right of first refusal into the holdover period in order to make "holdover tenancies more stable." *Smyth*, 242 Cal. Rptr. 3d at 345. Like Delaware, California prescribes an express month-to-month term for a holdover period, generally. Cal. Civ. Code § 1945 (West 2010).

Delaware and California's rule, and thus their "public policy" support for this rule, is inapplicable to North Carolina. As stated by our Supreme Court, the "common understanding and rules applicable to the dealings of landlord and tenant after the termination" of a lease agreement in North Carolina is:

> Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, *or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year* and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy.
>
> The parties to the lease may, of course, agree upon a different relationship.

Coulter, 266 N.C. at 217, 146 S.E.2d at 100 (citations omitted) (emphasis supplied). The parties can also reach an express, independent agreement irrespective of the lease for a right of first refusal as is contained in the signed and recorded Memorandum. Further, in *Spinks v. Taylor*, our Supreme Court held that a landlord maintains the right of peaceful self-help to evict a holdover tenant and to regain possession of the premises, at least in a non-residential lease. *Spinks v. Taylor*, 303 N.C. 256, 262, 278 S.E.2d 501, 504 (1981). The lease before us is a commercial lease between parties of relatively equal bargaining power.

In deciding the applicability of rights of first refusal to holdover tenancies, if the agreement before us is wholly dependent upon the lease, North Carolina should consider persuasive authority from states with similar holdover tenancy structures. Wisconsin enacted a statute which "gives the landlord the election to treat the holdover tenant as a tenant from year to year under the lease and gives both the landlord and the tenant the right to terminate such lease at the end of any year upon 30-days-written notice." *Last v. Puehler*, 120 N.W.2d 120, 122 (Wis. 1963). In its consideration of rights of first refusal, the Wisconsin Supreme Court stated:

> We consider an option to purchase or right of a first refusal to be an integral part of the lease and one of its terms within the meaning of this section. It is not an uncommon practice to insert an option to purchase or a right of first refusal in a lease. In many cases no lease would be entered into by the tenant without such protection.
>
> The interpretation commanded by the language of this section is both logical and fair. Upon the expiration of the written lease the tenant has the duty to surrender the property. If he holds over, he runs the risk of being considered a holdover tenant with all the burdens of the lease. The pinpointed question in this case is whether he also runs the risk, if it is one, of acquiring all the benefits which the lease might provide. Conversely, the landlord may eject the tenant, make a new agreement mutually satisfactory to him and the tenant, or elect under sec. 234.07, Stats. By such an election the landlord receives the benefits of the lease from year to year but likewise incurs its obligations and the tenant is then bound from year to year both as to the advantages and disadvantages to him of the lease. It is logical to believe the legislature intended by the operation of this section to *leave the parties as they were under the original lease after the landlord elected to come under the section. We cannot construe the statute to mean that by the election of the landlord a common law tenancy is created free and clear from some terms of the lease but not from others.*

Id. at 122-23 (emphasis supplied).

This analysis and logic presumes a right of first refusal or other option to purchase carries forward into a holdover tenancy unless a

contrary intent appears. Unlike in both *Vernon* and *Hannah*, the lease in this case contained no language indicating the right of first refusal did not carry into the year-to-year tenancy. The applicable law to these facts should be applied under this analysis.

III. Conclusion

The Defendants failed to meet their burden to be awarded summary judgment, as factual questions of intent of the parties remain. I disagree with the majority opinion's holding and with its application of policies from states with disparate holdover tenancy rules. Also, the recorded Memorandum contains an express right of first refusal agreement between the parties, which is not tied to nor dependent upon the lease.

Genuine issues of material facts exist of the parties' intent and actions. I vote to reverse summary judgment and remand to the trial court for a hearing on the merits. I respectfully dissent.

CUMBERLAND COUNTY EX REL: STATE OF ALABAMA O. B. O.: ALISHA LEE, PLAINTIFF
v.
CLIFFORD LEE, DEFENDANT

No. COA18-754

Filed 7 May 2019

Contempt—civil—child support—burden of proof—ability to comply

Even though defendant did not meet his burden of proof to show cause why he should not be held in civil contempt for his failure to comply with a child support order, plaintiff child support enforcement agency nonetheless was required to present sufficient evidence to support a finding that defendant had the ability to comply with the previous order and to purge himself by making regular payments. Because the agency presented no such evidence, the order was vacated and remanded.

Appeal by defendant from order entered 11 January 2018 by Judge Robert J. Stiehl, III in Cumberland County District Court. Heard in the Court of Appeals 11 April 2019.

Cumberland County Child Support Department, by Ben Logan Roberts and Roxanne C. Garner, for plaintiff-appellee.

C. Leon Lee, II, pro se, for defendant-appellant.

ARROWOOD, Judge.

Clifford Lee ("defendant" or "C. Leon Lee, II") appeals from an order holding him in civil contempt. For the reasons stated herein, we vacate and remand.

I. Background

On 3 July 2002, a Cumberland County District Court entered an order whereby defendant was ordered to pay $350.00 per month, beginning 1 August 2002, for the support of his minor child. The Cumberland County Child Support Enforcement Agency ("plaintiff" or "the agency") filed a motion to intervene on behalf of the custodial parent of the minor child, Alisha Blackmon Lee ("relator"), to provide child support enforcement services. The motion came on for hearing on 1 November 2007 before the Honorable A. Elizabeth Keever in Cumberland County District Court. On 10 March 2008, the trial court entered an order allowing plaintiff to intervene and ordering defendant to pay the ongoing child support obligation into the North Carolina Child Support Centralized Collections.

Plaintiff filed a motion to terminate ongoing child support and to establish arrears with repayment on 18 January 2011. The motion and a notice of hearing for 17 February 2011 was served on defendant by first class mail on 21 January 2011. Defendant moved for a continuance on 4 February 2011. The trial court denied defendant's motion for a continuance at the 17 February 2011 hearing, the Honorable Kimbrell Kelly-Tucker presiding. That same day, the trial court entered an order terminating ongoing child support, effective 30 June 2010, establishing defendant's arrears at $9,839.30 and setting repayment at $385.00 per month, beginning 1 March 2011.

On 12 April 2017, the trial court entered an order to appear and show cause for defendant's failure to comply with the 17 February 2011 order. Defendant was served personally with the order to show cause on 11 May 2017. Defendant moved to continue the hearing on 15 May 2017. The trial court granted the motion and continued the hearing to 29 June 2017. The matter was continued four additional times.

The order to appear and show cause came on for hearing on 22 November 2017 in Cumberland County District Court, the Honorable Robert J. Stiehl, III presiding. However, during the hearing, defendant claimed an order existed that was not in the file, so the trial court continued the matter. The hearing continued from the previous setting on

20 December 2017. Defendant made various arguments, but did not testify and offered no other evidence. On 11 January 2018, the trial court entered an order for contempt, finding, *inter alia*:

> 1. That on July 19, 2002 an Order was entered in this case whereby the Defendant was ordered to pay $350.00 per month for the support and maintenance of the minor child . . . beginning August 1, 2002.
>
> . . . .
>
> 4. It was established that the Defendant owed $9,839.30 in outstanding arrears as of February 16, 2011.
>
> 5. In addition, the Defendant was ordered to pay the sum of $385.00 per month to be applied to the outstanding arrears beginning March 1, 2011 until paid in full. That said Order remains in full force and effect.
>
> 6. That since the entry of the February 17, 2011 Order, the Defendant has made a total of $5,070.28 in payments toward the outstanding arrears.
>
> . . . .
>
> 14. That since the entry of the Order, the Defendant has failed to comply with the payment terms of the aforesaid Order and as of November 30, 2017 the Defendant owes a total outstanding arrears of $4,769.12 and compliance arrears of $4,769.12 based on the records of North Carolina.
>
> 15. That since the entry of the Order, the Defendant has not been under any physical or mental disability that would prevent him/her from working.
>
> . . . .
>
> 18. That the Defendant had the ability to comply with the previous Order and has the ability to purge himself/herself as ordered.

Based on the foregoing findings of fact, the trial court concluded "[t]hat the Defendant is in willful contempt of this Court for his[/her] failure to comply with the terms and conditions of the Order previously entered in this case." The trial court ordered defendant's purge condition is to make regular payments.

Defendant appeals.

II. Discussion

Defendant argues the trial court committed reversible error by finding him in willful contempt because: (1) the record contains no evidence of his ability to pay the outstanding arrears as ordered, and (2) the agency made accounting errors. We agree that there is no evidence of defendant's ability to pay in the record. Therefore, we vacate the order and remand. We do not reach the second issue on appeal.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted), *disc. rev. denied*, 362 N.C. 373, 662 S.E.2d 551 (2008). Findings of fact made by the trial court during contempt proceedings "are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Cumberland Cty. ex rel. Mitchell v. Manning*, __ N.C. App. __, __, 822 S.E.2d 305, 307-308 (2018) (quoting *Watson*, 187 N.C. App. at 64, 652 S.E.2d at 317).

> A trial court may hold a party in civil contempt for failure to comply with a court order if:
>
> "(1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order."

Id. at __, 822 S.E.2d at 308 (quoting N.C. Gen. Stat. § 5A-21(a) (2017)).

Proceedings for civil contempt may be initiated:

> (1) "by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt;" (2) "by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should

> not be held in contempt;" or (3) "by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt."

Id. at __, 822 S.E.2d at 308-309 (quoting *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-205 (2012); N.C. Gen. Stat. § 5A-23 (2017)). An alleged contemnor has the burden of proof under the first two methods used to initiate a show cause proceeding. *Id.* (citation omitted). However, if an aggrieved party initiates a show cause proceeding instead of a judicial official, the burden of proof is on the aggrieved party instead, "because there has not been a judicial finding of probable cause." *Id.* (quoting *Moss*, 222 N.C. App. at 77, 730 S.E.2d at 205).

In *Cumberland Cty. ex rel. Mitchell v. Manning*, our Court reviewed an order for contempt that resulted from the agency filing a show cause for the defendant's failure to comply with a child support order. *Id.* at __, 822 S.E.2d at 306-307. The defendant argued, *inter alia*, that the trial court's findings on willfulness and present ability to pay were not supported by competent evidence and did not support the trial court's conclusions. *Id.* at __, 822 S.E.2d at 306. Our Court held that although the defendant had the burden of proof under N.C. Gen. Stat. § 5A-23 and failed to present any evidence at the hearing,

> the burden shift under the first two ways of commencement does not divest the trial court of its responsibility to make findings of fact supported by competent evidence: "despite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt."

Id. at __, 822 S.E.2d at 309 (quoting *Cty. of Durham v. Hodges*, __ N.C. App. __, __, 809 S.E.2d 317, 324 (2018)) (citations omitted). Accordingly, because "[t]he record [was] devoid of evidence of [d]efendant's ability to pay the child support amount or purge amount at the time of the hearing[,]" "the trial court's finding on [d]efendant's ability to pay the child support amount owed and the purge amount [was] not supported by competent evidence." *Id.* at __, 822 S.E.2d at 310. As the trial court's determination of willfulness was predicated upon defendant's ability to pay, our Court vacated the order and remanded for proceedings not inconsistent with the opinion. *Id.*

Similarly, in the case at bar, defendant had the burden of proof under N.C. Gen. Stat. § 5A-23, and failed to present any evidence at the hearing. His argument now raises the same issue decided in *Cumberland Cty. ex rel. Mitchell*: whether the agency must put forth sufficient evidence to support a factual finding that the defendant had the ability to pay when a defendant fails to meet his or her burden of proof to show cause why he or she should not be held in civil contempt.

Although our Court answered this question in *Cumberland Cty. ex rel. Mitchell*, the agency argues that our Court is not bound by *Cumberland Cty. ex rel. Mitchell* because it misinterpreted North Carolina law. We disagree. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Accordingly, we are bound by the precedent set out in *Cumberland Cty. ex rel. Mitchell*.

Furthermore, we note that the plaintiff-appellee agency in the instant case was also the plaintiff-appellee agency in *Cumberland Cty. ex rel. Mitchell*. However, the agency never sought review of *Cumberland Cty. ex rel. Mitchell* in our Supreme Court, which would have been the proper course to argue the case was decided inconsistently with North Carolina law, instead of attempting to relitigate *Cumberland Cty. ex rel. Mitchell* in the case now before us.

Because we remain bound by the decision set out in *Cumberland Cty. ex rel. Mitchell*, defendant's failure to meet his burden of proof to show cause did not divest the agency of its burden to put forth "sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Cumberland Cty. ex rel. Mitchell*, __ N.C. App. at __, 822 S.E.2d at 309. The agency did not meet this burden, as it put forth no evidence to support the finding of fact "[t]hat the Defendant had the ability to comply with the previous Order and has the ability to purge himself[/herself] as ordered[,]" which is required to support contempt in civil contempt proceedings to enforce orders for child support. *See Plott v. Plott*, 74 N.C. App. 82, 84-85, 327 S.E.2d 273, 275 (1985) ("It is well established that in civil contempt proceedings to enforce orders for child support, the court is required to find only that the allegedly delinquent obligor has the means to comply with the order and that he or she wilfully refused to do so.") (citations omitted).

Therefore, as in *Cumberland Cty. ex rel. Mitchell*, we vacate the contempt order and remand for proceedings not inconsistent with this holding.

III. Conclusion

For the forgoing reasons, we vacate the contempt order and remand for proceedings not inconsistent with this holding.

VACATED AND REMANDED.

Judges DIETZ and ZACHARY concur.

DEPARTMENT OF TRANSPORTATION, Plaintiff
v.
HUTCHINSONS, LLC, Defendant

No. COA18-675

Filed 7 May 2019

1. Eminent Domain—interlocutory appeal—Section 108 motion—trial court's authority to proceed

In a condemnation action, defendant-landowner's alleged notice of appeal from the trial court's dismissal of its Section 108 motion did not divest the trial court of authority to enter further orders in the case, for several reasons: (1) the trial court reasonably believed that its dismissal of the Section 108 motion did not affect a substantial right because the motion was not made with 10 days' notice, as required by N.C.G.S. § 136-108; (2) the trial court may have reasonably believed that the dismissal of the Section 108 motion did not affect a substantial right that would otherwise be lost and therefore was not immediately appealable, because the motion involved an additional, later taking that could be addressed through a separate inverse condemnation action; and (3) defendant's notice of appeal appeared to be from two other motions and not the Section 108 motion, despite defendant's argument to the contrary.

2. Eminent Domain—subsequent takings—Section 108 motion—untimely—trial court's authority to rule on motion—prejudice

In a condemnation action, the trial court erred by determining that it lacked authority to rule on defendant-landowner's motion for a Section 108 hearing where defendant failed to make the motion

with 10 days' notice, as required by N.C.G.S. § 136-108. However, any error in dismissing the motion based on untimely notice was not prejudicial because defendant remained able to seek compensation for the alleged subsequent taking in a separate inverse condemnation action.

3. Eminent Domain—motion for continuance—based on untimely filing of plat—delay in filing motion

In a condemnation action, the trial court did not abuse its discretion by refusing to grant defendant-landowner's motion for a continuance where the reason for defendant's motion was the Department of Transportation's untimely filing of the plat—3 months before the scheduled trial date—and defendant waited until the week before the scheduled trial date to file the motion.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgment entered 14 December 2017 by Judge Susan E. Bray in Wilkes County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the Plaintiff-Appellee.

Sever-Storey, LLP, by Shiloh Daum, for the Defendant-Appellant.

DILLON, Judge.

This is a condemnation action brought by Plaintiff Department of Transportation ("DOT") for the partial taking of land owned by Defendant Hutchinsons, LLC ("Hutchinsons"). On the day the trial in the matter had been scheduled, the trial court heard various motions filed by Hutchinsons, primarily concerning Hutchinsons' position that DOT took more interests in its property than DOT had claimed. The trial court denied or dismissed those motions. The trial court proceeded, and subsequently entered judgment awarding Hutchinsons no further damages than the amount of DOT's deposit. Hutchinsons appeals from various orders considered the day of trial and from the final judgment. After careful review, we affirm.

I. Background

This action concerns certain property in Wilkes County which straddles North Carolina Highway 268 (the "Property") owned by Hutchinsons.

In September 2015, DOT commenced this action against Hutchinsons, condemning part of the Property for the widening of Highway 268.

Approximately eleven (11) months later, in August 2016, Hutchinsons filed its Answer.

The matter was eventually assigned a trial date of 21 August 2017. However, about a month before the scheduled trial date, Hutchinsons requested a continuance. The trial court granted the request, setting 4 December 2017 as the new trial date.

A few days before the scheduled 4 December 2017 trial, Hutchinsons filed three motions. These motions were based primarily on its belief that, during the course of the highway widening project, DOT had taken additional interests in the Property, that is, interests outside of the interests indicated in DOT's complaint. Specifically, Hutchinsons moved: (1) to amend its pleading to add an inverse condemnation claim for the alleged additional taking; (2) for a Section 108 hearing[1] to determine the actual areas/interests in the Property taken (the "Section 108 motion"); and (3) for a continuance of the trial.

On 4 December 2017, the date the matter was scheduled for trial, the trial court heard Hutchinsons' three motions. During the hearing, the trial court orally dismissed the Section 108 motion and denied the two other motions. The trial court then reduced its ruling on the two denied motions to written orders but did not immediately reduce its dismissal of the Section 108 hearing motion to writing. Hutchinsons then submitted a written notice of appeal of "the Order entered" and a motion for a stay of any further proceedings pending the appeal. The trial court denied Hutchinsons' motion for a stay and proceeded to consider the issue of damages.

The next day, on 5 December 2017, the trial court entered a written order dismissing Hutchinsons' motion for a Section 108 hearing. The trial court also entered a written order striking Hutchinsons' original Answer as a sanction for certain discovery violations.

The following week, on 14 December 2017, the trial court entered a final judgment for DOT in the amount of its initial deposit, thereby awarding Hutchinsons no further damages for the taking described in

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1. A "Section 108" hearing is a hearing authorized pursuant to Section 136-108 of our General Statutes wherein the trial court is to resolve issues concerning the taking *other than* the issue of damages before submitting damages to a jury. N.C. Gen. Stat. § 136-108 (2017).

DOT's Complaint, based on the fact that Hutchinsons' Answer challenging the amount of the deposit had been stricken. Hutchinsons timely filed s second notice of appeal, an appeal from this final judgment.

II. Analysis

Hutchinsons makes three arguments on appeal. We address each of Hutchinsons' arguments in turn.

A. Trial Court's Jurisdiction to Enter Orders After December 4

[1] Hutchinsons argues that the trial court lacked the authority to enter *any* orders after Hutchinsons filed its first notice its appeal on the day of trial, December 4, from the dismissal of its Section 108 motion. For the reasons stated below, we conclude that the trial court retained authority to enter further orders, including the final judgment favorable to DOT entered December 14, even after Hutchinsons noticed an appeal on December 4 from an interlocutory order.

The trial court's orders entered on December 4 and 5, denying two of Hutchinsons' motions and dismissing Hutchinsons' Section 108 motion were interlocutory. Generally, interlocutory orders are not immediately appealable, and an appeal from a nonappealable interlocutory order does not divest the trial court of jurisdiction. *See Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 382-83 (1950) ("[A] litigant can not deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal to the [appellate] Court from a nonappealable interlocutory order of the Superior Court.").

But some interlocutory orders are immediately appealable, such as those which may affect a substantial right. N.C. Gen. Stat. § 1-277 (2017). And the general rule is that a *valid* appeal from an interlocutory order does generally divest the trial court of jurisdiction in a matter, at least with respect with to any matter "embraced" within the order. N.C. Gen. Stat. § 1-294 (2017); *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) ("The well-established rule of law is that an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal." (internal quotation omitted)). Therefore, any order entered by the trial judge after a valid appeal from an interlocutory order affecting a substantive right has been properly noticed is generally treated as void for want of jurisdiction. *See France v. France*, 209 N.C. App. 406, 410-11, 705 S.E.2d 399, 404 (2011).

But we have also held that a trial court's orders entered following a validly noticed appeal of an interlocutory order *may still be valid* if

(1) the trial court continued to exercise jurisdiction under a *reasonable* belief that the interlocutory order was not immediately appealable and (2) the appealing party was not prejudiced by the trial court's continued exercise of jurisdiction. *RPR & Assoc., Inc., v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 347-49, 570 S.E.2d 510, 514-15 (2002); *see also Plasman v. Decca Furniture, Inc.*, ___ N.C. App. ___, ___, 800 S.E.2d 761, 767-71 (2017).

Here, Hutchinsons argues in its appellate brief that the trial court's "ruling on [Hutchinsons'] § 108 Motion for determination of issues other than damages affected a substantial right" and, therefore, its notice of appeal therefrom filed the day of trial divested the trial court of jurisdiction to do anything further. The trial court, nonetheless, proceeded *believing* that it still had jurisdiction to act.[2]

Without deciding whether the trial court's ruling on Hutchinsons' Section 108 motion affected a substantial right, we conclude that the trial court had the authority to proceed for a number of reasons.

First, the trial court reasonably believed that its dismissal of a Section 108 motion did not affect a substantial right based on its conclusion that the motion was not made with ten (10) days' notice as required by Section 136-108. Specifically, as shown in our analysis of the issue in Subsection B. of this opinion below, the trial court reasonably believed that Hutchinsons had no right to have its Section 108 hearing heard.[3] And, as admitted in Hutchinsons' motion, Hutchinsons was not

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2. We note, as DOT points out, that the copy of Hutchinsons' December 4 notice of appeal in the record does not contain a stamp showing that it was ever filed with the clerk in the courtroom. N.C. R. App. P. 3(a) (stating that an appeal is taken "by filing notice of appeal with the clerk of superior court and serving copies thereof upon all parties . . . "). Indeed, that there are notations on the copies in the record of orders entered on December 4 indicating that they were filed with the clerk in the courtroom. But no such notation appears on the notice of appeal purportedly filed on 4 December. However, Hutchinsons filed a motion to supplement the record on appeal with a copy of the notice of appeal marked with a notation by the clerk that it was filed on December 4. We allow Hutchinsons' motion.

3. Assuming the trial court was correct in its reasoning in dismissing the Section 108 motion based on inadequate notice, it may be argued that Hutchinsons' appeal was still valid, based on a view that "we do not reach the *merits* of an appellant's claim to that substantial right in answering the threshold [appellate] jurisdictional question." *See Neusoft Med. Systems, USA, Inc., v. Neuisys, LLC*, 242 N.C. App. 102, 107, 774 S.E.2d 851, 855 n.1 (2015). But there is other authority which suggests that our Court does consider the merits of the claim in considering the threshold jurisdictional question. *See, e.g., Knighten v. Barnhill Contracting Co.*, 122 N.C. App. 109, 112, 468 S.E.2d 564, 566 (1996) (considering merits of the defendant's claim of immunity in dismissing appeal). Therefore, it was reasonable for the trial court to conclude that its order dismissing Hutchinsons' Section 108 motion was not appealable.

prejudiced as Hutchinsons was not deprived of its right to pursue its inverse condemnation claims in a separate action.

Second, the trial court may have reasonably believed that its order dismissing the Section 108 motion did not affect a substantial right that would otherwise be lost and, therefore, was not immediately appealable. Our Supreme Court has held that *certain* orders from a Section 108 hearing determining the extent of the initial taking may be immediately appealable. *See e.g.*, *DOT v. Rowe*, 351 N.C. 172, 176-77, 521 S.E.2d 707, 710 (1999). But, here, Hutchinsons was not arguing in its Section 108 motion that the initial taking covered more of the Property than indicated by DOT. Rather, Hutchinsons was contending that the DOT engaged in a further taking *subsequent* to the filing DOT's complaint. Indeed, Hutchinsons states in its motion that DOT engaged in activities, *e.g.*, storing construction materials, *during* the highway construction on the Property outside of the area originally taken where highway construction on the Property did not begin until after DOT filed its Complaint. Further, Hutchinsons acknowledges in its motion that it would not lose the right to bring a claim for the additional taking it was alleging but could do so through a separate inverse condemnation action.[4]

Third, it appears that Hutchinsons' notice of appeal filed on December 4 was not from the dismissal of the Section 108 motion, as the dismissal was not entered until the next day, but rather from the denial of one of the other two motions heard that day. Indeed, the notice of appeal states that it is from "the Order *entered* . . . and filed on December 4, 2017 . . . [a] copy of the Order from which Defendant undertakes this appeal is attached" (emphasis added). Though our Rules of Appellate Procedure do allow for a notice to be taken from a rendered (oral) order, N.C. R. App. P. 3(a) (stating that a party may appeal from an order "rendered in a civil action"), the language of Hutchinsons' notice of appeal expressly indicates that Hutchinsons was appealing from an order "entered" on December 4 and that the ordered appealed from was physically attached to the notice. It would have been impossible for Hutchinsons to have attached the order dismissing its Section 108

4. Based on Supreme Court precedent, Hutchinsons had the right to have any pending inverse condemnation counterclaim be tried in this action brought by DOT. *See DOT v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 n.1 (1983). But, assuming such right to have it tried in this action is a substantial right, there was not an inverse condemnation yet pending before the trial court, as none had been pleaded in Hutchinsons' Answer. Hutchinsons was attempting to amend its Answer through a motion filed just days before trial to add an inverse condemnation claim. But the trial court, in an exercise of its discretion, denied Hutchinsons' motion to do so.

motion to the December 4 notice of appeal, as that dismissal order was not even entered until the next day.

The two orders which the trial court did enter on December 4 were (1) the order denying Hutchinsons' motion for leave to amend its pleading and (2) the order denying Hutchinsons' motion for a continuance. But Hutchinsons has made no argument on appeal concerning how either December 4 order affected a substantial right such that the trial court was divested of jurisdiction to proceed to trial and enter further orders. *See Hoots v. Pryor*, 106 N.C. App. 397, 403, 417 S.E.2d 269, 273 (1992) (noting that "[a]n appeal from the *denial of a motion to amend* a pleading is ordinarily interlocutory and not immediately appealable" (emphasis in original)).

The trial court has now entered a final judgment in this matter, and we therefore have jurisdiction to consider Hutchinsons' other arguments, which we do so below.

B. Timeliness of Section 108 Hearings

[2] Hutchinsons argues that the trial court erred in dismissing its motion for a Section 108 hearing. We disagree.

Hutchinsons contends that on 29 November 2017, five days before trial, it first discovered that DOT was using a portion of the Property outside of that described in DOT's complaint and that on 1 December 2017 it filed a motion for a Section 108 hearing to determine exactly what other portions of the Property DOT was using to facilitate the widening of Highway 268. The trial court dismissed the motion because Hutchinsons filed it less than ten (10) days before trial was to begin.

Section 136-108 of the North Carolina General Statutes states that the trial court shall determine all issues other than just compensation following a party's motion *and ten (10) days' notice*:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2017). Pursuant to this Section, questions of ownership, title to property, and what amounts to the "entire area" affected are determined by the trial court prior to a jury trial, while the

issue of just compensation is left to the jury. *See Rowe*, 351 N.C. at 175, 521 S.E.2d at 709.

Hutchinsons contends that failure to provide ten (10) days' notice, though required by the statute, is not fatal to its motion for a Section 108 hearing.

In an excellent, thorough opinion authored by Justice Samuel Ervin, Jr., almost seven decades ago, our Supreme Court stated that notice of a motion is not required where the matter is already pending in a session of court, *unless actual notice is required by some particular statute*:

> The law manifests its practicality in determining "When notice of a motion is necessary". When a civil action . . . is regularly docketed for hearing at a term of court, notice of a motion need not be given to an adversary party, *unless actual notice is required in the particular cause by some statute.*

Collins v. N.C. State Highway, 237 N.C. 277, 282, 74 S.E.2d 709, 714 (1953) (concerning a condemnation action brought under Chapter 40 of our General Statutes) (emphasis added).

It could be strongly argued that the ten (10) days' notice required in Section 108 is "actual notice" that "is required in the particular cause by some statute," even where the motion is brought up during a regular session in which the matter is already pending. Indeed, Section 108 expressly states that the 10-day notice provision applies whether the Section 108 motion is filed "either in or out of term[.]" However, a panel of our Court held half a century ago that a trial court may hear a Section 108 hearing without ten (10) days' notice, where the matter is already before the trial court:

> Appellants contend that [Section 136-108] requires notice of ten days before the court can hear the matter to determine issues and that because this notice was not given, the court was without jurisdiction to hear the matter. This contention is without merit. . . . [Our] Supreme Court and this Court have said repeatedly that parties are fixed with notice of all motions or orders made during the session of court in causes pending therein, and the statutory provisions for notice of motions are not applicable in such instances.

State Highway Comm'n v. Stokes, 3 N.C. App. 541, 545, 165 S.E.2d 550, 552-53 (1969). The S*tokes* panel, though, did not cite Justice Ervin's

opinion in *Collins*. Rather, it cited *Harris v. Board of Education*, in which our Supreme Court states the general rule that "[p]arties to actions are fixed with notice of all motions or orders made during the term of court in causes pending therein[,]" without stating the exception to this rule for those motions where notice is required in the particular cause by some statute. *Harris v. Bd. of Educ. of Vance Cty.*, 217 N.C. 281, 283, 7 S.E.2d 538, 538 (1940). We note that Justice Ervin, too, cited *Harris*, along with other cases from our Supreme Court, for the proposition that notice *is still required* for motions heard on the day of trial, where notice is required in the particular cause by some statute.

Be that as it may, our Supreme Court has never expressly ruled on the notice provision in Section 108. We are, therefore, bound by *Stokes*, and we must conclude that the trial court erred in determining that it lacked the authority to rule on Hutchinsons' motion for a Section 108 hearing on the scheduled trial date.[5]

In any event, we hold that any error by the trial court in dismissing Hutchinsons' Section 108 motion based on untimely notice was not prejudicial. Indeed, Hutchinsons conceded in its motion that it did not lose the right to seek compensation for any subsequent taking by DOT in a separate inverse condemnation action. *Bragg*, 308 N.C. at 371, 302 S.E.2d at 230 n. 1.

C. Motion to Continue

[3] Hutchinsons argues that the trial court erred in denying its motion to continue the trial. (This was one of the two orders denied on the day of the scheduled trial.) "Denial of a motion for a continuance is [generally] reviewable on appeal only for abuse of discretion." *In re Will of Yelverton*, 178 N.C. App. 267, 274, 631 S.E.2d 180, 184 (2006). "If, however, a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984).

This appeal involves Hutchinsons' rights under the constitutional doctrine of eminent domain. Specifically, Hutchinsons asserts that the trial court should have granted its request for a continuance because DOT did not file the plat until September 2017 – three months before the scheduled trial – and, therefore, it was impossible, or at least ineffectual,

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5. A trial court may, of course, *deny* a Section 108 motion to add property interests based on the fact that the landowner waits until the day of trial to bring the motion. But, based on *Stokes*, the trial court always has the authority to hear the motion.

for Hutchinsons to ascertain how much of the Property was being taken until that point. Though it is true that DOT did not make timely delivery of its plat, we note that Hutchinsons' also failed to timely comply with discovery requests.

Based on our review of the record, we conclude that the trial court did not abuse its discretion by refusing to grant Hutchinsons' motion for a continuance, a motion which was not filed until the week before the scheduled trial date, over two months after DOT filed the plat.

III. Conclusion

Hutchinsons makes no arguments challenging the trial court's decision to strike its answer and enter final judgment, apart from its argument that the trial court did not have jurisdiction to enter those orders. Therefore, based on the our review of the arguments before us, we find no prejudicial error in the trial court's decision to dismiss and deny Hutchinsons' motions and affirm the final judgment of the trial court.

AFFIRMED.

Judge MURPHY concurs.

Judge ARROWOOD concurs in result only.

MILTON DRAUGHON, SR., Plaintiff
v.
EVENING STAR HOLINESS CHURCH OF DUNN, Defendant/Third-Party Plaintiff
v.
DAFFORD FUNERAL HOME, INC., Third-Party Defendant

No. COA18-887

Filed 7 May 2019

1. Negligence—premises liability—hazardous condition—duty to warn—genuine issue of material fact

In a negligence suit against a church—where plaintiff ascended the church steps while carrying a casket during a funeral, tripped on the top step, and injured his knees—the trial court erred in granting the church's summary judgment motion because plaintiff introduced evidence that he was unaware of the hazardous condition (caused by the top step's irregular height) despite having descended

the stairs just moments before he tripped. This evidence created two genuine issues of material fact—whether the hazard was hidden or open and obvious, and whether plaintiff had equal or superior knowledge of the hazard—precluding a decision as a matter of law that the church did not owe plaintiff a duty to warn of the hazardous condition.

2. Negligence—premises liability—contributory negligence—choice between a safe and dangerous way

In a negligence suit against a church—where plaintiff tripped and injured his knees while carrying a casket up the church stairs during a funeral—plaintiff was not contributorily negligent in taking the stairs rather than an adjacent ramp, in traversing the stairs sidestep, or in relying on three other strong men to help him carry the casket. Plaintiff presented evidence that he had no trouble safely carrying the casket and that he fell because of an imperceptible hazard caused by the top step of the staircase. Taking this evidence in the light most favorable to plaintiff, a reasonably prudent person in plaintiff's situation would not have believed that extra precautions were necessary.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 4 June 2018 by Judge Beecher R. Gray in Harnett County Superior Court. Heard in the Court of Appeals 13 February 2019.

Brent Adams & Associates, by Gregory A. Posch and Brenton D. Adams, for Plaintiff-Appellant.

Yates, McLamb & Weyher, by Sean T. Partrick and John W. Graebe, for Defendant/Third-Party Plaintiff-Appellee.

No brief filed by Third-Party Defendant.

INMAN, Judge.

Plaintiff Milton Draughon, Sr., ("Plaintiff") appeals from an order granting summary judgment in favor of Defendant/Third-Party Plaintiff Evening Star Holiness Church of Dunn (the "Church") on Plaintiff's negligence claims. Plaintiff argues that summary judgment was improper, asserting a genuine issue of material fact existed as to: (1) the presence

of a legal duty owed to him by the Church; and (2) his contributory negligence in falling on a set of stairs leading into the Church while carrying a casket. After careful review, we reverse the ruling of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

The record below indicates the following:

Plaintiff attended a funeral at the Church, located at Sampson Avenue in Dunn, North Carolina, on a sunny day in February of 2015. Before the service started, Plaintiff entered the Church sanctuary through an entrance facing Sampson Avenue. As Plaintiff and a church deacon were speaking, the minister who would be conducting the service approached and asked Plaintiff if he would be willing to help carry the deceased's casket into the sanctuary. Plaintiff declined. Some time later, an employee of the funeral home, Third-Party Defendant Dafford Funeral Home, Inc. ("Dafford"),[1] asked Plaintiff to help carry the casket. Plaintiff reconsidered and agreed to help, as he felt physically capable of assisting and Dafford did not have enough employees on hand to carry the casket into the building.

Plaintiff followed the Dafford employee out of the sanctuary through a door facing U.S. Route 421, different than the door Plaintiff had entered earlier, and descended a set of concrete and brick stairs. Once outside, Plaintiff walked approximately 25 to 30 feet to the hearse containing the casket. Plaintiff joined three other men at the hearse, and the group carried the casket, without any apparent difficulty, to the bottom of the stairs Plaintiff had navigated moments earlier. They then began ascending the stairs, unhindered by the casket. Before reaching the entryway, Plaintiff, who was positioned on the front left side of the casket, tripped on the top step and injured his knees. The top step was approximately two-and-a-half inches taller than the preceding steps.

Plaintiff filed suit against the Church on 22 August 2017, alleging negligence, negligence *per se*, and *res ipsa loquitur* arising out of the stair's defective and dangerous condition, *i.e.*, the difference in height between the top step and the ones below it. In response, the Church filed a combined answer and third-party complaint against Dafford for contribution and indemnification, asserting by affirmative defense that Plaintiff was contributorily negligent in failing to use reasonable care. Plaintiff, with leave of the trial court, filed an amended complaint on 5 March 2018.

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1. Counsel for Dafford has not entered an appearance in this appeal, so we limit our discussion of Dafford to the factual and procedural history.

The Church moved for summary judgment on Plaintiff's claims. The Church's motion argued, among other things, that Plaintiff possessed equal or superior knowledge of the alleged defective condition, having descended the stairs without issue moments before tripping. Plaintiff filed an affidavit in opposition; he also filed an affidavit from an engineering expert attesting to the defect in the stairs. Following a hearing, the trial court granted the Church's summary judgment motion on the grounds that Plaintiff had equal or superior knowledge of the open and obvious hazard and failed to exercise due care in navigating the steps. Plaintiff appeals.

II. ANALYSIS

Plaintiff argues that because he introduced sufficient evidence demonstrating genuine issues of material fact, his negligence claim should have survived summary judgment. The Church disagrees, asserting that: (1) Plaintiff had equal or superior knowledge of the alleged defect so the Church did not owe him a duty of care; and (2) Plaintiff's contributory negligence caused him to trip. Reviewing the evidence and applicable law, we agree with Plaintiff and reverse the trial court.

A. Standard of Review

"[The] standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The party moving for summary judgment holds the burden of showing "there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law." *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972) (citation omitted). We must construe the evidence introduced at summary judgment "in the light most favorable to the nonmoving party and with the benefit of all reasonable inferences." *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997).

"Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury." *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 388 S.E.2d 129, 131 (1986) (citation omitted). "Issues of contributory negligence, like those of ordinary negligence are rarely appropriate for summary judgment. Only where plaintiff's own negligence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Jenkins*, 125 N.C. App. at 104, 479 S.E.2d at 261 (citations omitted).

B. Duty to Warn

[1] The parties dispute whether Plaintiff's evidence discloses a duty owed to him by the Church. Landowners "have a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604 (2002) (citing *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 89, 555 S.E.2d 303, 306 (2001)). This "reasonable care" requires landowners to "warn[a lawful visitor] of hidden conditions and dangers of which the landowner has express or implied notice." *Barber*, 147 N.C. App. at 89, 555 S.E.2d at 306. That said, "a landowner need not warn of any 'apparent hazards or circumstances of which the invitee has equal or superior knowledge.' " *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000) (quoting *Jenkins*, 125 N.C. App. at 105, 479 S.E.2d at 262).

The Church argues that Plaintiff had equal or superior knowledge of the stairs' condition because he had descended them without issue before later tripping on ascent, noting that this Court has upheld entry of summary judgment on premises liability claims where the plaintiffs had previously avoided or successfully navigated the hazards that later caused injury. *Bolick*, 150 N.C. App. at 429, 562 S.E.2d at 603; *Von Viczay*, 140 N.C. App. at 740, 538 S.E.2d at 631. Those cases are distinguishable.

In *Bolick*, a customer asked to use a store's bathroom. 150 N.C. App. at 428-29, 562 S.E.2d at 603. A store employee directed the customer to several steps leading to a slightly raised bathroom door. *Id.* The customer successfully traversed the stairs, which were lit by several light sources, and used the bathroom. *Id.* at 429, 562 S.E.2d at 603. When she exited, the customer fell down the stairs and injured herself; she later filed suit, averring that the step-down from the bathroom door constituted a hazardous condition. *Id.* On these facts, we held that summary judgment for the defendant store was proper, as "plaintiff had full knowledge of the condition of the doorway to the bathroom by virtue of having safely negotiated her way inside the bathroom moments before she fell." *Id.* at 431, 562 S.E.2d at 604.

Similarly, in *Von Viczay*, the plaintiff walked down an icy path to the front door of a home to attend a party. 140 N.C. App. at 737-78, 538 S.E.2d at 630. The plaintiff was able to observe the ice and snow that covered the ground and walkway, as they were well lit. *Id.* When the plaintiff later exited the home, she slipped and fell on the ice; because the plaintiff had seen the ice and already successfully navigated the hazardous condition once before, we held she had failed to demonstrate the defendant owed her any duty. *Id.* at 740, 538 S.E.2d at 632.

Unlike the plaintiffs in *Bolick* and *Von Viczay*, Plaintiff has introduced evidence that he did not have knowledge of the hazardous condition caused by the irregular height of the top step despite descending the stairs just moments earlier. In his affidavit, Plaintiff stated that this defect could not "be perceived by the naked eye at a reasonable distance while climbing those stairs . . . [or] while walking down the stairs or while walking up the stairs." By contrast, in *Bolick* and *Von Viczay* it was undisputed that the hazards were known to the plaintiffs. *Bolick*, 150 N.C. App. at 431, 562 S.E.2d at 604; *Von Viczay* 140 N.C. App. at 737-78, 538 S.E.2d at 630. Those decisions, therefore, are inapplicable to the situation, presented here, in which a plaintiff introduces evidence showing he was unaware of and unable to discern the hazardous condition despite prior exposure. As a result, we hold that there exists a genuine issue of material fact as to whether Plaintiff had equal or superior knowledge of the hazard at issue, and summary judgment on this ground was improper.

Having held that a genuine issue of material fact exists concerning Plaintiff's knowledge of the hazard, we believe this case is more similar to *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990), than the precedents cited by the Church. In *Lamm*, the plaintiff exited a building by descending a set of steps that terminated in an asphalt ramp leading to a parking lot. *Id.* at 414, 395 S.E.2d at 114. The top two steps were six and one-half inches high; the final step, because of the manner in which the ramp was constructed, had "the effective height of . . . eight and one-half inches." *Id.* The plaintiff slipped and fell as she was stepping off the bottom step and later brought suit to recover for her injuries. *Id.* at 414-15, 395 S.E.2d at 114. The trial court entered summary judgment for the defendants and we reversed; on appeal to the Supreme Court, our decision was modified and affirmed. *Id.* at 418, 395 S.E.2d at 116. In its opinion, the Supreme Court determined from the plaintiff's evidence that:

> [T]he fact that the last step down is some two inches deeper than the other two steps, partly as a result of this sloping, is not so obvious to someone descending the stairs. The combination of the slope and the variation of the height cannot be said as a matter of law to be an open and obvious defect of which plaintiff . . . should have been aware.

Id. at 416-17, 395 S.E.2d at 115. Summary judgment was therefore improper, as "[a] jury could find that this variation in riser height, in part caused by the slope of the asphalt, was a hidden defect which

defendants should have known about and that defendants had a duty to warn plaintiff[.]" *Id.* at 417, 395 S.E.2d at 115.

The Church argues that *Lamm* is inapposite, asserting it: (1) involved a plaintiff with no prior experience with the hazard, and therefore does not concern a plaintiff with equal or superior knowledge; and (2) addresses hidden, and not open and obvious, defects. These arguments are misplaced. First, as set forth *supra*, there exists a genuine issue of material fact as to Plaintiff's knowledge of the hazard at issue.[2] Second, as set forth *infra*, Plaintiff's forecast of the evidence discloses a genuine issue of fact concerning whether the defect was hidden or open and obvious, just as in *Lamm*.

Plaintiff's affidavit states that the defect in question—the variation in height between the top step and the preceding ones—was not observable from a reasonable distance or while descending or ascending the stairs. Taken in the light most favorable to him, this evidence creates a disputed issue of material fact concerning whether the defect was hidden or open and obvious. The same evidence creates a disputed factual issue regarding whether Plaintiff had equal or superior knowledge of the danger after descending the stairs and while approaching with the casket. These factual disputes preclude a decision as a matter of law that the Church did not owe Plaintiff a duty to warn of the alleged defect.

As noted by the dissent, the Church points out that Plaintiff testified at his deposition that he tripped on both the top of the fourth step *and* the brick riser of the top step; he also acknowledged he made contact with the top of the fourth step first. But Plaintiff also testified that "I tripped on the top step and fell into the church." This testimony concerning the cause of Plaintiff's fall and the role of the fourth step and defective top riser in it raises a factual question for the jury to resolve.

In *Lamm*, the defendants attempted a similar argument, "contend[ing] that plaintiff's forecast of evidence shows only that the sloping of the asphalt ramp and not the riser height was the cause of her accident, and therefore the accident was caused by an open and obvious condition of which defendants had no duty to warn plaintiff." *Lamm*, 327 N.C. at 417, 395 S.E.2d at 115-16. Our Supreme Court reasoned that "[w]hile in her deposition plaintiff kept referring to the 'slope' as the

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2. As a factual matter, the Church appears to be incorrect in claiming the plaintiff in *Lamm* had never before traversed the steps on which she was injured. *Lamm v. Bissette Realty*, 94 N.C. App. 145, 148-49, 379 S.E.2d 719, 722 (1989) (Lewis, J., dissenting) ("The evidence also shows that plaintiff had walked up and down the same place approximately 30 days earlier and again only 15 minutes before she fell.").

cause of her fall, plaintiff never denied that the variation in the riser height contributed to her fall. This ostensible conflict regarding causation is not properly settled by summary judgment; it is a question for the jury." *Id.* at 417, 395 S.E.2d at 116.

Consistent with *Lamm*, we hold that summary judgment was improper and that a jury should have the opportunity to resolve the factual questions discussed above. *See also Kiser v. Snyder*, 17 N.C. App. 445, 450, 194 S.E.2d 638, 641 (1973) (holding that when the plaintiff's own evidence presented conflicts internal to both his deposition and affidavits concerning negligence, contributory negligence, and damages, summary judgment was improper).

C. Contributory Negligence

[2] The Church argues an alternative basis for affirming the trial court's order, asserting that "Plaintiff was contributorily negligent because he walked into a danger that was open and obvious." Having held that there is a genuine issue of material fact concerning the openness and obviousness of the hazard at issue, we need not address this argument. The Church also asserts that, even if the defect was hidden, Plaintiff was contributorily negligent in electing to use the stairs rather than taking an adjacent ramp. The cases cited by the Church for this proposition, however, are not applicable here.

The Church first sites *Kelly v. Regency Centers Corp.*, 203 N.C. App. 339, 691 S.E.2d 92 (2010), in which this Court held a plaintiff was contributorily negligent as a matter of law in failing to avoid an openly and obviously dangerous condition. 203 N.C. App. at 343-44, 691 S.E.2d at 95-96. In the present case, and as detailed *supra*, the openness and obviousness of the defect that led to Plaintiff's injury is an issue of fact raised by the evidence; as a result, *Kelly*'s holding is of no import. In the other case cited by the Church, *Dunnevant v. Southern Railway Co.*, 167 N.C. 232, 83 S.E. 347 (1914),[3] our Supreme Court held that a plaintiff was contributorily negligent when he elected to leave a train platform via a darkened set of stairs he knew to be dangerous rather than descending a well-lit alternative available and known to him. 167 N.C. at 233, 83 S.E. at 348. The Supreme Court premised its holding on the maxim that "[i]f two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, *with knowledge of the danger*, constitutes contributory negligence." *Id.* (citations omitted) (emphasis added). Here, Plaintiff introduced evidence showing he did not have

3. This decision was reprinted in 1953 at 167 N.C. 272.

knowledge of the defect that he contends led to his injury and that the defect was undiscoverable by the means available to him at the time; as a result, *Dunnevant* is distinguishable.

Notwithstanding these differences, the Church contends that no reasonably prudent person would elect to carry a casket by hand up the stairs under the circumstances faced by Plaintiff independent of his subjective knowledge of any danger. *See*, *e.g.*, *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (noting a plaintiff "may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety" (citation omitted)). However, under this rule, "[t]he standard of care required differs with the exigencies of the situation." *O'Neal v. Kellett*, 55 N.C. App. 225, 229, 284 S.E.2d 707, 710 (1981) (citation omitted).

The Church asserts Plaintiff was contributorily negligent in: (1) failing to use a nearby ramp; (2) failing to ask for additional assistance in carrying the casket or suggesting the use of a trolley; and (3) ascending the stairs sideways while carrying the casket. These conclusory assertions of fact, however, are disputed by Plaintiff's evidence. Plaintiff's deposition testimony and affidavit assert that the danger in this case was not the act of carrying a casket up a flight of stairs, but was instead a hazardous difference in height between the top step and the ones below it; indeed, Plaintiff stated in his affidavit that his "fall occurred solely because [he] tripped on the top stair of the staircase" and expressly disclaimed any effect the casket had on his ability to climb the steps. He also testified in deposition that he had no concerns carrying the casket with just four people and reiterated in his affidavit that he is "a strong man and had no difficulty lifting the casket or carrying the casket[.]" Nor, per his affidavit, did he have a "reason to think that four strong adults could not safely carry a casket up a flight of stairs." As for the danger itself, Plaintiff's affidavit states that "the defect in the stairs . . . cannot be perceived by the naked eye at a reasonable distance while climbing those stairs" or "while walking down . . . or . . . up the stairs[,]" and he testified at deposition that he "didn't recognize" the defect at the time he descended the steps.

Taking this evidence in the light most favorable to Plaintiff, a reasonable and prudent person would not know to take any precautions against this apparently imperceptible danger, whether carrying a casket or not. Thus, that same reasonable and prudent person would not believe taking the adjacent ramp to be necessary, nor feel the need to seek additional help or use a trolley, and we do not believe that carrying

a casket up the church steps into the sanctuary for a funeral is an indisputably negligent act. *Cf. O'Neal*, 55 N.C. App. at 228-29, 284 S.E.2d at 710 ("When she was injured, plaintiff was where she had a privilege to be: using a common area of defendants' premises intended for use by defendants' tenants. Under these circumstances, it cannot be said as a matter of law that plaintiff was required to avoid the use of the stairs or to use them at her peril, or that she was required to use an alternate route." (citations omitted)). So we cannot conclude that, as a matter of law, Plaintiff was contributorily negligent in electing to utilize the apparently safe stairs rather than taking the casket up the adjacent ramp. Nor can we conclude he was contributorily negligent as a matter of law in traversing the stairs side-step with a casket in hand or in relying on three other "strong men" to assist him where Plaintiff's evidence, taken in the light most favorable to him, demonstrates no additional help was needed to carry the casket.

III. CONCLUSION

For the foregoing reasons, we reverse the trial court's entry of summary judgment for the Church and remand for further proceedings.

REVERSED AND REMANDED.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I believe that the evidence establishes, as a matter of law, that Plaintiff was contributorily negligent when he tripped walking up steps leading from the sidewalk into the Church building. Specifically, the evidence conclusively establishes that Plaintiff began his fall when he tripped over a step which was properly constructed. And, the evidence also conclusively establishes that Plaintiff was negligent as he stumbled over the next step whose defective design was obvious. I believe that Judge Gray ruled correctly and, therefore, I dissent.

Here, Plaintiff's own expert described the stairs essentially as follows: There are five concrete steps leading from the sidewalk to the Church's entry door. But there is also a rise from the top (fifth) concrete step into the Church building itself. The rises between the five concrete steps (that is, between the first and second, the second and third, the third and fourth, and the fourth and fifth) are all concrete and are

uniform in height, about 6.5 inches each. However, the rise between the fifth concrete step and the interior of the Church building, composed of mostly red brick (part of the Church building) and a white-painted, wooden threshold, is over 10.5 inches.

I agree with the majority that Plaintiff's evidence is sufficient to reach the jury on the question of whether the Church's negligence was a proximate cause of Plaintiff's fall; Plaintiff stated that he tripped as he was stepping from the top concrete step into the Church building; Section 1115.3(b) of the our State Building Code requires that "risers [shall be] of uniform height in any one flight of stairs[;]" and our Supreme Court has indicated that a violation of the Building Code may constitute negligence *per se*. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990); *see Pasour v. Pierce*, 76 N.C. App. 364, 368, 333 S.E.2d 314, 317 (1985) ("[A] violation of the Building Code in North Carolina is negligence *per se*.").

But I also conclude that the evidence establishes, as a matter of law, that Plaintiff's own negligence, too, was a proximate cause in his fall and subsequent injury. Specifically, Plaintiff admitted in his deposition that he began his fall when he tripped as he was stepping from the fourth concrete step to the fifth concrete step, before attempting to make the last step into the Church building:

> Q: Are you tripping on concrete or brick?
>
> A: Both of them, really.
>
> Q: Which one do you trip on first?
>
> A: Well, it would have to be that one first because it comes first.
>
> Q: Which one? The concrete?
>
> A: Yeah, it would have to be that.
>
> Q: Would it be the front of the concrete you trip on, that step of concrete?
>
> A: No, it would have been *the front of it*.

(Emphasis added.) Through this testimony, Plaintiff clearly states that he first tripped on the top of the concrete rise between the fourth and fifth step. Any doubt as to what Plaintiff was saying was cleared up with his response to the following question, which clearly assumes that Plaintiff began tripping as he was stepping on the fifth concrete step:

> Q: From the area you started tripping, which you say [is] the front of this concrete step, would you draw a line from that point over to this part of the picture and put a 1 on it.

Plaintiff then marked on a photo of the steps that he began tripping on the *top front corner* of the fifth concrete step; he did not initially trip on the 10.5 inch rise from the fifth step into the Church building. This picture marked by Plaintiff was before Judge Gray and is part of the record on appeal. And Plaintiff's own evidence, through the affidavit of his expert, is uncontradicted that this step between the fourth and fifth concrete step was not in violation of the Building Code, as it was uniform with the other steps that Plaintiff had just ascended.

I am guided by our Supreme Court that "if [a] step is properly constructed and well lighted so that it can be seen by one entering or leaving the [building], by the exercise of reasonable care, then there is no liability." *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 159, 108 S.E.2d 461, 467 (1959) (reversing the trial court's denial of the defendant's motion for nonsuit, holding that the defendant was not liable *as a matter of law*). Based on *Garner*, I conclude that the Church was not liable with respect to Plaintiff's stumble as he stepped from the fourth concrete step to the fifth. The beginning of Plaintiff's fall was clearly due *entirely* to Plaintiff's own negligence, which makes this present case distinguishable from *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990), cited by the majority.

I further conclude that Plaintiff was contributorily negligent, as a matter of law, as he as he took his final, off-balanced step into the Church building itself. Assuming, the Church may have been negligent as to this final step because of the height differential, Plaintiff was also negligent for not taking due care in taking this final step. Plaintiff's own expert described the rise between the concrete steps as being concrete, but that the rise between the last concrete step into the church consisted of some concrete, then brick, and then a wooden threshold, a difference which I believe was open and obvious. The picture of the steps in the record shows obvious differences between the other step rises and the rise leading into the building, such as the rise into the building consisting of some concrete, then mostly dark red brick, and then a white threshold, whereas the other rises were uniformly gray concrete. Further, Plaintiff had walked down these same steps just minutes prior to the fall, surely noticing the height differential as he stepped from the Church building to the top step. And the evidence shows that it was daytime when he fell. *See Stoltz v. Burton*, 69 N.C. App. 231, 236, 316

S.E.2d 646, 649 (1984) (affirming summary judgment for the defendant and citing *Garner*, stating that an injured plaintiff "behaved negligently by not exercising due care to protect herself" when walking down a step of which she had an unobstructed view in broad daylight).

IN THE MATTER OF B.C.T., J.B.B.

No. COA18-929

Filed 7 May 2019

1. Child Abuse, Dependency, and Neglect—voluntary placement—review hearing—incomplete record on appeal

In a juvenile case, where the mother voluntarily placed her two children with a family friend pursuant to an agreement with the Department of Social Services (DSS), it was impossible to review the mother's argument on appeal that the trial court should have held a hearing to review the placement, as required under N.C.G.S. § 7B-910. Neither the agreement with DSS nor any documentation of its terms were included in the record on appeal, so it was impossible to determine whether section 7B-910 even applied to the case.

2. Child Abuse, Dependency, and Neglect—disposition—findings of fact—sufficiency

On appeal from the initial disposition in a juvenile case, in which the trial court placed the mother's two children with a family friend, the disposition orders were reversed and remanded because they contained multiple findings of fact that were conclusory and unsupported by competent evidence. Notably, the record lacked any substantive evidence regarding the family friend, her home, or care of the children, but contained ample evidence that the mother had fully complied with her family services agreement and with all recommendations from the Department of Social Services.

3. Child Custody and Support—custody granted to a non-parent—findings of fact—basis in competent evidence

In a juvenile case, a civil order granting full custody of a mother's minor child to a family friend was reversed and remanded because the trial court's findings of fact—including its findings that the family friend was a "fit and proper person" to have custody and that the mother acted inconsistently with her constitutionally protected status as a parent—were not based on any competent evidence.

4. Appeal and Error—swapping horses on appeal—disposition order in a juvenile case

On appeal from a disposition order in a juvenile case, in which the trial court placed the mother's child in the legal custody of the Department of Social Services (DSS) and the physical custody of a family friend, DSS could not argue that the disposition order should be affirmed when its position at trial was that the child should be returned to the mother. Simply put, DSS could not "swap horses" on appeal in this way.

Appeal by respondent from orders entered 23 April 2018 by Judge William B. Sutton, Jr. and 27 June 2018 by Judge Carol A. Jones in District Court, Sampson County. Heard in the Court of Appeals 27 February 2019.

Warrick, Bradshaw and Lockamy, P.A., by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Forrest Firm, P.C., by Patrick S. Lineberry, for respondent-appellant mother.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.

STROUD, Judge.

Respondent-Mother appeals from disposition orders for her minor children, B.C.T. ("Benjamin") and J.B.B. ("Jeffrey")[1] and a related civil custody order for Jeffrey. Because there is no competent evidence to support many of the trial court's findings, and the conclusions of law are not supported by the findings, we reverse and remand.

I. Background

Sampson County Department of Social Services ("DSS") became involved with Mother in March of 2017 after receiving a report of physical injury and injurious environment in Mother's home.[2] DSS had received a report that Mother's boyfriend, Travis Matthis, who lived with Mother, had punched Benjamin, age seven in the stomach. Mother had

1. Pseudonyms are used for ease of reading and to protect the juveniles' identities.

2. Benjamin and Jeffrey have different fathers. Benjamin's father did not participate in the trial, but Jeffrey's did. Neither father is a party to this appeal.

previously allowed her other son, Jeffrey, age twelve, to live with a family friend, Kristen Mitchell, because Jeffrey did not like Mr. Matthis.[3] After the report to DSS regarding Benjamin, Mother voluntarily agreed to place Benjamin with Ms. Mitchell as well. After an assessment, DSS determined that Mother and Mr. Matthis needed to address emotional and mental health issues, family relationships, and parenting skills. In May 2017, DSS developed a home services agreement with Mother and in June 2017 did the same for Mr. Matthis. Neither agreement is in our record on appeal. According to the reports and testimony in the record, Mother's family services agreement required her to attend individual therapy, take all medications as prescribed, attend couple's counseling with Mr. Matthis and follow any recommendations, and participate in a parenting education curriculum. There is no indication in our record that DSS ever requested that Mr. Matthis move out of Mother's home. Throughout the investigation and until entry of the order on appeal, Mother had unsupervised and unlimited visitation with both children, but Mr. Matthis saw Benjamin only during therapy sessions.

DSS filed a separate petition for each child on 6 November 2017 alleging that they were abused and neglected juveniles; the allegations of the two petitions are substantially identical. The petitions note they were filed only because Mr. Matthis had not completed his family services agreement, although Mother had. Several court dates were set for a pre-adjudication hearing but were continued for various reasons. On 20 February 2018, the trial court entered pre-adjudication orders for Jeffrey and Benjamin.

On 15 March 2018, Mother entered into a "consent to findings of fact" related to an adjudication of neglect only. These stipulations were:

> 1. That on or about March 14, 2017, the Sampson County Department of Social Services received a report of Injurious Environment.
>
> 2. That the Juveniles resided in the home of his mother and his mother's boyfriend Travis Matthis.
>
> 3. That the Juvenile [Jeffrey] the older sibling made allegations of physical abuse against Mr. Matthis. Later, the Juvenile [Benjamin] made similar allegations.
>
> 4. That those allegations were denied by Respondent Mother and Mr. Matthis.

3. There is no indication in our record that DSS had any involvement in Mother's previous voluntary placement of Jeffrey with Ms. Mitchell.

5. That neither Juvenile required medical treatment for any such physical abuse and that there were no marks on the juveniles to substantiate said claims.

6. That Respondent Mother voluntarily placed the Juvenile [Jeffrey] with a family friend Hope Mitchell as [Jeffrey] did not want to be in the home with Mr. Matthis.

7. That the Respondent Mother admitted to domestic violence in the home which included Mr. Matthis holding a gun to her head when she was previously pregnant.

8. That Mr. Matthis was previously diagnosed with bipolar disorder and admitted to not taking his medication.

9. That Respondent Mother admitted to leaving the child with Mr. Matthis even though she admitted she had concerns of her own personal safety with Mr. Matthis.

10. On April 19, 2017, DSS substantiated injurious environment.

11. On or about May 29, 2017, In Home Services were put into place for Respondent Mother to include individual therapy, medication compliance, couple's counseling with Mr. Matthis and parenting education.

12. On June 9, 2017 DSS developed In Home Services plan with Mr. Matthis was developed whereby Mr. Matthis agreed to complete a mental health evaluation and follow and [sic] recommendations as well as attend individual therapy to include domestic violence counseling.

13. That prior to the filing of the petition, Respondent Mother had completed most of Service Agreement but Mr. Matthis had not made substantial progress with his Service Agreement.

On 23 April 2018, the trial court entered an order apparently based entirely upon the stipulated facts adjudicating Benjamin and Jeffrey as neglected within the meaning of N.C. Gen. Stat. § 7B-101(15); there was no adjudication of abuse or dependency.[4] Neither the trial court's order nor Mother's stipulations addressed the fitness of Ms. Mitchell as a caregiver or the appropriateness of placement in her home.

4. The stipulated facts are not attached to or incorporated into the order but the order does refer to them.

Mother complied with all of the requirements of the family services agreement, and DSS noted that "[t]hroughout the CPS Investigation and In-Home Services cases, Respondent Mother has exceeded the department's recommendations and has been cooperative."

Mr. Matthis also agreed to a family services agreement which included completing a mental health evaluation and following any recommendations. The mental health evaluation recommended that Mr. Matthis attend outpatient therapy and complete a psychological evaluation. Mr. Matthis completed the psychological evaluation, but that evaluation recommended no further treatment or therapy.[5] DSS noted that Mr. Matthis' attendance to couples therapy was inconsistent, but that he "began cooperating once petitions were filed in the case."

The disposition hearings for each child were held simultaneously on 10 May 2018. DSS's report recommended that Benjamin—the child Mr. Matthis had allegedly punched—be returned to Mother, but that legal and physical custody of Jeffrey be granted to Ms. Mitchell. At the disposition hearing, a social worker testified that Mother had complied with her family services agreement and she was satisfied with Mother's efforts, but that she remained in a relationship with Mr. Matthis. She recommended that custody of Benjamin be granted to Mother and that DSS be released from his case. She recommended that custody of Jeffrey be granted to Ms. Mitchell due to the length of time he had already been with her and his stated desire to stay with her, and that DSS be released from his case and a Chapter 50 custody order be entered. Although Mother had previously had unlimited visitation, DSS recommended unsupervised visitation of at least one hour every other week.

The only other witness who testified was a therapist who had provided individual therapy to the children and family counseling to Mother and Mr. Matthis. One issue raised at the hearing was whether Mother or Ms. Mitchell had been coaching the children; the therapist testified that the children had reported that Ms. Mitchell said things such as, "Travis [Matthis] is never going to change, he's never going to be nice to you." The only evidence in the record regarding Ms. Mitchell's home was from the DSS court report that her home was in the same school district as Mother's home and all of Benjamin's needs were met. The only testimony regarding Ms. Mitchell's home at the disposition hearing was:

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5. The evaluation is not in our record, but the DSS reports and testimony show that Mr. Matthis had completed everything DSS had asked him to do.

Q. Now, the home that [Jeffrey's] staying in, you've had an opportunity to see that home. Is that correct?

A. Yes ma'am.

Q. And, the home he has there, I believe he has a four wheeler or an ATV, is that correct?

A. Correct.

Q. He has video games. Is that right?

A. As far as I know. I've been told of that.

Q So, he has pretty much whatever a child desires as it relates to toys and those kind of things. Is that right?

A. Yes ma'am.

On 27 June 2018, the trial court entered a disposition order for each child. As to Benjamin, age seven, the trial court did not adopt DSS's recommendation that he be returned to Mother's custody since Mr. Matthis was still in the home, and entered a disposition order providing that: (1) legal custody remain with DSS and that he continue placement with Ms. Mitchell; (2) the permanent plan shall be reunification with Mother and a concurrent secondary plan of custody to a "relative or other suitable person"; (3) DSS make reasonable effort to "effectuate the current plan" for Benjamin; (4) Benjamin have no contact with Mr. Matthis; and (5) Mother have supervised visitation of at least one hour every other week.

The trial court followed DSS's recommendations as to Jeffrey, and the disposition order for Jeffrey included findings of fact regarding Mother's compliance with the family services agreement and the following:

14. That the Juvenile has been adamant that he does not desire to be returned to his mother's home and expressly desires to remain in his current placement.

15. That it is not likely that the Juvenile will be returned home within the next six (6) months and placement with a parent is not in the Juvenile's best interests.

16. That the Respondent Mother is not making adequate progress within a reasonable period of time under the current permanent plan.

17. That the Respondent Mother is not actively participating in or cooperating with the plan, the Department

of Social Services, and the Guardian ad Litem for the Juvenile.

. . . .

19. That the Respondent Mother is not acting in a manner consistent with the health or safety of the Juvenile.

. . . .

24. That the best plan of care to achieve a safe, permanent home for the Juvenile within a reasonable period of time is custody to a relative or other suitable person.

25. That the Department has made reasonable efforts in this matter to develop and implement a permanent plan for the Juvenile.

26. That the Court finds that the conditions which led to the removal of the Juvenile from the Juvenile's home still exists and that a return of the Juvenile to said home would be contrary to the welfare of the Juvenile.

27. That there is no longer a need for continued State intervention on behalf of the Juvenile through a juvenile court proceeding.

28. That the Juvenile was residing with Kristen "Hope" Mitchell at the time of the filing of the Petition.

. . . .

30. That, by clear and convincing evidence, the Respondent Mother is not a fit and proper person to have the care, custody, and control of the Juvenile and has acted inconsistently with her constitutionally protected status as a parent to the Juvenile.

The disposition orders provided for Mother to have one hour of supervised visitation a week. A related civil custody order was also entered on the same day granting physical and legal custody of Jeffrey to Ms. Mitchell, with Mother to have one hour of supervised visitation every other week. Mother timely appealed the disposition orders for Benjamin and Jeffrey, but her notice of appeal failed to include the related civil custody order.

II. Petition for Writ of Certiorari

Mother asks this Court to issue a writ of certiorari to address the civil custody order which was not included in her notice of appeal for Jeffrey.

> Pursuant to N.C. Gen. Stat. § 7B 1001 (2013), notice of appeal and notice to preserve the right to appeal shall be given in writing within 30 days after entry and service of the order. An appellant's failure to give timely notice of appeal is jurisdictional, and an untimely attempt to appeal must be dismissed. However, writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals. This Court has held that an appropriate circumstance to issue writ of certiorari occurs when an appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal.

In re J.C.B., 233 N.C. App. 641, 645, 757 S.E.2d 487, 490 (2014) (citations, brackets, ellipsis, and quotation marks omitted).

Mother's notice of appeal for each case refers to the "Order of Adjudication signed by the Honorable William Sutton, Jr. on March 15, 2018 and Order of Disposition signed by the Honorable Carol Jones on May 10, 2018."[6] Mother acknowledges that her "notice of appeal, however, did not reference the civil custody order entered pursuant to N.C. Gen. Stat. § 7B-911." In our discretion, we grant Mother's petition for writ of certiorari and review the civil custody order along with the disposition orders.

III. N.C. Gen. Stat. § 7B-910 Hearing

[1] The trial court entered a disposition order as to each child, and portions of the two orders are identical and Mother raises the same legal issues for those portions. We will address the portions of the two orders which are the same together. But the two orders decree a different disposition for each child and include some different conclusions of law, so we will address the portions of the order which differ separately for each child. The first issue, which applies to both children, is whether the trial court erred by failing to hold a hearing as required by N.C. Gen. Stat. § 7B-910 to review the voluntary placements of the children within

6. We note that even though Mother's notice of appeal references the adjudication orders, she makes no argument in her brief challenging the adjudication orders.

90 days of the placement under her agreement with DSS. *See* N.C. Gen. Stat. § 7B-910 (2017).

Mother argues that the trial court violated the review requirements of N.C. Gen. Stat. § 7B-910, and since no hearing occurred, both children should have been returned to her since an "adjudication petition was not filed after [they were] in Ms. Mitchell's custody for six months." We review statutory errors *de novo*. *In re K.M.M.*, 242 N.C. App. 25, 28, 774 S.E.2d 430, 432 (2015).

N.C. Gen. Stat. § 7B-910 states:

> (a) The court *shall* review the placement of any juvenile in foster care made pursuant to a voluntary agreement between the juvenile's parents or guardian and a county department of social services and shall make findings from evidence presented at a review hearing with regard to:
>
> (1) The voluntariness of the placement;
>
> (2) The appropriateness of the placement;
>
> (3) Whether the placement is in the best interests of the juvenile; and
>
> (4) The services that have been or should be provided to the parents, guardian, foster parents, and juvenile, as the case may be, either (i) to improve the placement or (ii) to eliminate the need for the placement.
>
> (b) The court may approve the continued placement of the juvenile in foster care on a voluntary agreement basis, disapprove the continuation of the voluntary placement, or direct the department of social services to petition the court for legal custody if the placement is to continue.
>
> (c) An initial review hearing shall be held not more than 90 days after the juvenile's placement and shall be calendared by the clerk for hearing within such period upon timely request by the director of social services.

N.C. Gen. Stat. § 7B-910 (emphasis added).

In response to Mother's argument that a hearing within 90 days of the voluntary placement was required, DSS contends that "[i]t is not apparent that N.C.G.S. § 7B-910, titled 'Review of voluntary foster care placements,' is applicable to the present case; placement of Benjamin with Ms. Mitchell in March 2017 did not involve DSS placement or the

foster care system." The guardian *ad litem* similarly argues, "since the Mother placed Benjamin with Ms. Mitchell without any agreement involving or with DSS, the requirement of a review hearing was not triggered." But although Mother placed Benjamin with Ms. Mitchell prior to DSS's involvement, she placed Jeffrey with Ms. Mitchell based upon some sort of agreement with DSS due to the investigation.

Our record is not sufficient to consider Mother's argument on N.C. Gen. Stat. § 7B-910 because her agreement with DSS, if any, is not in our record. The requirements of N.C. Gen. Stat. § 7B-910 apply to a "voluntary placement agreement," but not a "temporary parental safety agreement." *See* N.C. Gen. Stat. § 7B-910.[7]

It is the appellant's duty to include any information necessary for review of the issues raised on appeal. *See* N.C. R. App. P. 9(a). Since our record does not include documentation of the terms of the agreement with DSS, we cannot review Mother's argument regarding applicability of N.C. Gen. Stat. § 7B-910. But, as discussed below, we must reverse the orders on appeal based upon other issues with the trial court's actions.

IV. Findings of Fact

[2] "The standard of review that applies to an assignment of error challenging a dispositional finding is whether the finding is supported by competent evidence. A finding based upon competent evidence is binding on appeal, even if there is evidence which would support a finding to the contrary. *In re B.W.*, 190 N.C. App. 328, 332, 665 S.E.2d 462, 465 (2008) (citation, quotation marks, and brackets omitted). For challenged conclusions of law, we determine whether the trial court's facts support the challenged conclusion. *Id.* at 335, 665 S.E.2d at 467. "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007).

A. Finding of Dependency

Mother challenges finding of fact 1 from both orders which are identical in substance:

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7. In either type of agreement, both parties to the agreement have the right at any time to unilaterally revoke the agreement, and custody does not transfer with the agreement. *See* N.C. Dep't of Health and Human Svcs., Voluntary Placement Agreement (DSS-1789, rev 10/2010), https://www2.ncdhhs.gov/info/olm/forms/dss/dss-1789-ia.pdf; N.C. Dep't of Health and Human Svcs., Temporary Parental Safety Agreement (DSS-5231, rev. 01/2017), https://www2.ncdhhs.gov/info/olm/forms/dss/dss-5231-ia.pdf. A required component of both types of agreements is that they are voluntary in both the execution and their duration. *Id.*

> 1. That pursuant to a N.C. Gen. Stat. §7B-901, this matter comes on for a Dispositional Hearing following an adjudication of neglect and dependency which was made on March 15, 2018.

Mother argues that the children were never adjudicated dependent. In the trial court's orders on adjudication, Mother stipulated to certain facts and to an adjudication of neglect, but the trial court did not adjudicate Jeffrey or Benjamin as dependent. Therefore, the finding by the trial court that Jeffrey and Benjamin were adjudicated as dependent is not supported by competent evidence or by the adjudication orders.

B. Finding of Fact 4

Mother next challenges findings related to Ms. Mitchell. These findings are in both orders.[8] The first finding is:

> 4. That the home of Kristen "Hope" Mitchell is safe, suitable, and appropriate for the Juvenile.

Mother argues that there was no evidence regarding Ms. Mitchell's home and no findings of fact to demonstrate why her home is "safe, suitable, and appropriate." She contends that "[t]he trial court should have considered the availability of relative placements and should have verified whether Ms. Mitchell was an appropriate placement[,]" and "[t]he trial court's order should have contained more than conclusory determinations regarding Ms. Mitchell." Although a trial court need not include detailed findings as to all of the evidence presented, we agree this conclusory finding is not supported by the evidence or any other findings of fact. At the hearing, the only specific evidence regarding Ms. Mitchell or her home was that she had provided "pretty much whatever a child desires as it relates to toys and those kind of things," including a "four-wheeler or ATV" and video games. The only other evidence about Ms. Mitchell was from the children's therapist:

> Q. Okay. Now, if you could, if you know the relationship between Ms. Mitchell and the boys or how that - what that relationship is can you explain that? Is she just a family friend? Is she a distant cousin? Do you know?
>
> A. My understanding is that she is a family friend and that she has been a part of their lives for at least the majority of [Jeffrey's] life.

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8. The challenged finding is finding of fact number 4 in Jeffrey's order and 6 in Benjamin's order.

Neither DSS's reports nor the evidence and testimony at trial provided any substantive information about Ms. Mitchell, her home or her care of the children. Having "pretty much whatever a child desires as it relates to toys and those kinds of things" is not necessarily in a child's best interest. This testimony could also tend to support Mother's argument that Ms. Mitchell was seeking to alienate the children from her - many children would prefer to stay where they have "whatever a child desires as it relates to toys and those kinds of things." In any event, this evidence provides no basis for findings of fact regarding Ms. Mitchell's suitability as a custodian for the children. There is no competent evidence to support any of the trial court's findings regarding Ms. Mitchell, and the trial court's findings cannot support the related conclusions of law.

C. Findings of fact 29 and 32

Mother challenges findings of fact 29 and 32 in Jeffrey's order:

> 29. That Kristen "Hope" Mitchell is a fit and proper person to have the care, custody, and control of the Juvenile.
>
> . . . .
>
> 32. That it is in the best interests of the Juvenile for Kristen Hope Mitchell to be granted the care, custody, and control of the Juvenile.

Mother also challenges conclusion of law 5, which is identical to finding of fact 29:

> 5. That Kristen Hope Mitchell is a fit and proper person to have the care, custody, and control of the Juvenile.

We first note that finding 32 is actually a conclusion of law, which we review *de novo*:

> The determination of what will best promote the interest and welfare of the child, that is, what is in the best interest of the child, is a conclusion of law, and this conclusion must be supported by findings of fact as to the characteristics of the parties competing for custody. These findings may concern the physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. These findings cannot, however, be mere conclusions.

Hunt v. Hunt, 112 N.C. App. 722, 728, 436 S.E.2d 856, 860 (1993) (citations and quotation marks omitted).

A "conclusory recitation" of the best interests standard, without supporting findings of fact, is not sufficient. *See Lamond v. Mahoney*, 159 N.C. App. 400, 406, 583 S.E.2d 656, 660 (2003) ("Finding of fact 11, as a mere conclusory recitation of the standard, cannot support the order."). As discussed above, there was almost no evidence regarding Ms. Mitchell, her home, or her care of the children, so finding of fact 29 that she was a fit and proper person to have custody of the children is not supported by the evidence.

We have previously noted that the trial court need not use "magic words" in its findings of fact or conclusions of law, if the evidence and findings overall make the trial court's basis for its order clear. *See Davis v. Davis*, 229 N.C. App. 494, 503, 748 S.E.2d 594, 601 (2013). Here, we have disposition orders with "magic words" but no evidence to support some of the crucial findings of fact and thus no support for the related conclusions of law.

D. Finding of Fact 15

Mother next challenges finding of fact 15 in Jeffrey's order:

> 15. That it is not likely that the Juvenile will be returned home within the next six (6) months and placement with a parent is not in the Juvenile's best interests.

The basis for this finding is entirely unclear, since DSS reported, and the trial court found, that Mother had complied with everything required of her by the family services agreement. It is true that *Jeffrey*—age 12—had refused to participate in person with family therapy, but Mother did everything required of her by the family services agreement. It is noteworthy there was no prior court order requiring either her or Mr. Matthis to do anything, and no prior order that Mr. Matthis not be in the presence of the children. Mr. Matthis also complied with his family services agreement. The first and only substantive hearing in this case was the disposition hearing, where the trial court removed both children from Mother even though there had never been even an allegation she was unfit to care for the children, nor had the trial court entered any orders directing Mother, or Mr. Matthis to take any specific actions for the children to be returned to Mother. The only requirements placed upon Mother were those under the family services agreement. The social worker's recommendation that Jeffrey remain with Ms. Mitchell was based *only* on the length of time Jeffrey had lived with Ms. Mitchell and his desire to stay with her, not any concern about his safety with Mother or Mr. Matthis. This finding is not supported by the evidence.

E. Finding of Fact 26

Mother next challenges finding of fact 26[9] from both orders:

> 26. That the Court finds that the conditions which led to the removal of the Juvenile from the Juvenile's home still exists and that a return of the Juvenile to said home would be contrary to the welfare of the Juvenile.

According to the stipulations in the adjudication order, the "conditions which led to the removal" were allegations of one incident of Mr. Matthis punching Benjamin (which Mother and Mr. Matthis denied and was never established as fact by any order), reports of domestic violence between Mother and Mr. Matthis "when she was previously pregnant," and a report that in the past Mr. Matthis had been diagnosed with and needed treatment for bipolar disorder.[10] Based upon these concerns, DSS entered into family services agreements with both Mother and Mr. Matthis, and by the time of the disposition hearing, both had fully complied with DSS's recommendations to remedy the concerns regarding domestic violence, parenting skills, and mental health. There was no evidence that the conditions which led to removal still existed. The only condition which still existed was Jeffrey's desire to live with Ms. Mitchell. While Jeffrey had stated that his preference was to remain with Ms. Mitchell—perhaps because of the toys at her home or because he dislikes Mr. Matthis—custody cannot be granted to a third party unless the parent is unfit or has acted inconsistently with her constitutionally protected rights as a parent. *See Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). As long as the parent is fit to care for her child, the court cannot award custody of a child to a third party based only upon the child's preference or the fact that the third party "may offer more material advantages in life for the child." *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994); *see also Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E.2d 129, 142 (1978) ("When the child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of

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9. Finding of Fact 17 in Benjamin's order.

10. There is no indication of when this pregnancy occurred. Based upon our record, Mother has only these two children and there is no mention of any pregnancy since Benjamin, so her most recent pregnancy would presumably have been over seven years prior to the petition.

discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. . . . The preference of the child should be based upon a considered and rational judgment, and not made because of some temporary dissatisfaction or passing whim or some present lure." (alteration in original)).

At trial, the social worker testified about the reasons DSS recommended custody be granted to Ms. Mitchell:

> We are recommending that the temporary safety provider receive full custody of [Jeffrey]. *That is mainly due to the fact that he does not want to return to respondent mother's home at this time. And, he has been living with Ms. Mitchell for quite some time before DSS involvement.*

(Emphasis added.) All of DSS's evidence showed that Mother and Mr. Matthis had followed their family service agreements. DSS had recommended that Benjamin return to the home and would not have made this recommendation if concerns regarding his safety still existed. There is no evidence in the record that DSS or the trial court ever recommended or requested that Mr. Matthis be required to leave Mother's home. Finding of fact 26 is not supported by competent evidence.

F. Findings of Fact 16, 17, and 19

Mother challenges findings related to her progress with her "permanent plan":

> 16. That the Respondent mother is not making adequate progress within a reasonable period of time under the current permanent plan.
>
> 17. That the Respondent Mother is not actively participating in or cooperating with the plan, the Department of Social Services, and the Guardian ad Litem for the Juvenile.
>
> . . . .
>
> 19. That the Respondent Mother is not acting in a manner consistent with the health or safety of the Juvenile.

We first note that the trial court had adopted no "permanent plan" for either child, since no permanency planning hearing or review hearings of any sort were held. The only prior order was the adjudication of neglect based upon the stipulated facts. As has been noted, the social

worker's report and testimony show that DSS was fully satisfied with Mother's efforts. Indeed, it is not clear how Mother could have done anything else to participate in or cooperate with a plan, since DSS had no other recommendations or requirements for her. These findings are not supported by competent evidence.

G. Findings of Fact 24, 25, 27 and 30

Mother next challenges findings 24 through 27 and finding 30:

> 24. That the best plan of care to achieve a safe, permanent home for the Juvenile within a reasonable period of time is custody to a relative or other suitable person.
>
> 25. That the Department has made reasonable efforts in this matter to develop and implement a permanent plan for the Juvenile.
>
> . . . .
>
> 27. That there is no longer a need for continued State intervention on behalf of the Juvenile through a juvenile court proceeding.
>
> . . . .
>
> 30. That, by clear and convincing evidence, The Respondent Mother is not a fit and proper person to have the care, custody, and control of the Juvenile and has acted inconsistently with her constitutionally protected status as a parent to the Juvenile.

Once again, these findings are in part conclusions of law and are conclusory recitations of standards with no findings to support them. For all the reasons noted above regarding the other findings, these findings are also not supported by competent evidence. DSS's 10 May 2018 reports noted that [t]hroughout the CPS Investigation and In-Home Services cases, Respondent Mother has exceeded the department's recommendations and has been cooperative." The evidence presented at trial only supported DSS's statement, and we find no evidence at all—much less clear, cogent and convincing evidence—that Mother "has acted inconsistently with her constitutionally protected status as a parent." There was never any allegation that Mother had done *anything* to harm either child, and throughout the case, until entry of the disposition orders on appeal, she had unlimited, unsupervised visitation with no problems.

The social worker testified that she had visited Mother's home and it was sufficient to care for Jeffrey and Benjamin.

H. Civil Custody Order

[3] Mother also challenges findings of fact 5, and 7 through 11 of Jeffrey's civil custody order:

> 5. Pursuant to subsequent orders of this Court the Juvenile/Juveniles was/were placed with the Plaintiff herein.
>
> . . . .
>
> 7. No further review or judicial oversight is required pursuant to North Carolina Chapter 7B regarding the minor child(ren).
>
> 8. The Plaintiff is a fit and proper person to have the care, custody, and control of the minor child(ren).
>
> 9. That, upon clear and convincing evidence, the Defendant(s) have acted inconsistent with their constitutionally protected status as parents to the child(ren).
>
> 10. That, upon clear and convincing evidence, [Mother] is not fit and proper person to have the care, custody, and control of the minor child(ren).
>
> 11. That it is in the best interests of the minor child(ren) that the Plaintiff be granted the care, custody, and control of the minor child(ren).

No additional evidence was presented before the trial court for the civil custody order. As discussed above, the trial court's findings related to Ms. Mitchell are not based on competent evidence, the findings regarding Mother's failure to make progress on her plan are not supported by any evidence, and there was no evidence that Mother was unfit or had acted inconsistently with her constitutionally protected status as a parent. The trial court's conclusions of law as discussed above were not supported by the findings of fact.

V. Benjamin's Disposition Order

[4] One issue unique to Benjamin's case is that DSS recommended that Benjamin be returned to Mother's custody and that DSS be released

from the case. The trial court did not adopt this recommendation but instead placed him in the legal custody of DSS and allowed him to remain with Ms. Mitchell. Certainly the trial court does not have to follow DSS's recommendations, but it must make findings of fact based upon competent evidence to support its disposition. And this Court has previously held that parties are not allowed to make different arguments on appeal than before the trial court to "swap horses between courts in order to get a better mount." *In re I.K.*, 227 N.C. App. 264, 266, 742 S.E.2d 588, 590 (2013). DSS is not exempt from this rule. As in *In re I.K.*, DSS did not acknowledge that its position at trial was that Benjamin should be returned to Mother, and instead argued on appeal that the disposition order should be affirmed. Unsurprisingly, DSS cannot direct us to any evidence to support its arguments regarding Benjamin, since it did not seek to prove that Benjamin should remain in DSS's custody and the only reason it recommended that Jeffrey stay with Ms. Mitchell was his stated preference and the length of time Jeffrey had been with Ms. Mitchell. DSS's argument has changed on appeal, although the facts have not, and "[t]his is of particular concern because the primary goal of the Juvenile Code, which includes DSS's duties, is to seek to protect the best interests of abused, neglected, or dependent children. *Id.* at 266, 742 S.E.2d at 590-91. DSS is not obligated to adopt a different position on appeal just to oppose the appealing parent if it has previously determined that a parent has a safe and appropriate home and the child should be returned to the parent.

VI. Conclusion

We reverse and remand the trial court's disposition orders for Benjamin and Jeffrey and Jeffrey's civil custody order and instruct the trial court to hold a new hearing and enter orders with findings of facts supported by competent evidence that support its conclusions of law. To grant custody of a child to a third party, we note that the evidence must establish "that the legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent." *See Moriggia v. Castelo*, ___ N.C. App. ___, ___, 805 S.E.2d 378, 385 (2017). So far, no evidence has been presented which could support such a conclusion, and DSS did not take this position before the trial court. Although DSS recommended that Jeffrey remain in Ms. Mitchell's custody, this recommendation was apparently based *only* upon the child's wishes and the fact that he had been there "for quite some time before DSS involvement" and not upon Mother's unfitness. "Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court."

In re I.K., 227 N.C. App. at 276, 742 S.E.2d at 596. But based upon the evidence of record as of 10 May 2018, there is no factual support for a conclusion that Mother is unfit to have custody of her children, much less to limit her to an hour of supervised visitation every other week.

REVERSED AND REMANDED.

Judges TYSON and ARROWOOD concur.

IN THE MATTER OF WILLIE REGGIE HARRIS, PETITIONER

No. COA18-1026

Filed 7 May 2019

Child Abuse, Dependency, and Neglect—Responsible Individuals List—due process-notice

Petitioner's name could not be added to the Responsible Individuals List (RIL) where the county department of social services waited nearly four years to notify petitioner of its intent to place him on the RIL—well beyond the statutory timeframe for giving such notice (N.C.G.S. § 7B-320)—and thereby prejudiced Petitioner's ability to prepare a defense.

Appeal by respondent from order entered 25 April 2018 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 9 April 2019.

No brief for petitioner-appellee.

Mecklenburg County Department of Social Services Senior Associate Attorney Kathleen Arundell Jackson, for respondent-appellant Mecklenburg County Department of Social Services, Youth and Family Services.

TYSON, Judge.

Mecklenburg County Department of Social Services ("Respondent") appeals from the trial court's order, which determined Respondent had failed to provide Petitioner with timely notice and prevented Petitioner's name from being included on the Responsible Individuals List. We affirm.

I. Background

Mecklenburg County Child Protective Services completed an investigative assessment and substantiated a report alleging abuse. Petitioner was identified as the individual responsible on 13 December 2013. Criminal charges arising from the incident were dismissed.

Nearly four years later, Respondent mailed a letter to notify Petitioner of its intent to place him on the Responsible Individuals List ("RIL") on 18 August 2017. Petitioner filed a petition for judicial review on 7 September 2017.

At the hearing on 27 February 2018, Respondent presented testimony of the purported incident, which had occurred between 10 December 2013 and 13 December 2013. A.D., the alleged victim, testified that Petitioner was a family friend, who was living with her and her mother when A.D. was thirteen years old. On the day in question, Petitioner took the trash outside and upon his return, called out to A.D. to come "warm him up." A.D. hugged him, and they went into her mother's bedroom. A.D. told Petitioner her shoulders were hurting. Petitioner gave her a massage.

While lying together on the bed, Petitioner placed his hand on A.D.'s back, under her clothes, and placed her hand on his genitals and told her to "squeeze." He then requested she get on top of him. A.D. left the bedroom, went upstairs, and dressed for school. Petitioner told her not to tell her mother.

A.D. called her mother once she returned home from school and told her what had happened. A.D.'s mother made Petitioner move out and obtained a domestic violence protective order. The incident was reported to the police and charges were taken out against Petitioner, but were ultimately dismissed.

After the close of Respondent's evidence, Petitioner's counsel argued Respondent providing notice "[t]hree-and-a-half years later . . . is substantially too late for [Petitioner] to adequately prepare a defense . . . with the preponderance of the evidence standard. It makes it very difficult for him to present a defense at this late date."

Respondent argued N.C. Gen. Stat. § 7B-320 contained no consequences for its failure to provide the statutorily required notice to an identified Responsible Individual within five days of the completion of the investigation. When questioned by the trial court to explain why it took so long for Petitioner to be noticed, Respondent acknowledged the State had "determined that Mecklenburg County did not properly

handle a whole group of RIL cases, and they were all pulled at one time . . . the State of North Carolina directed Mecklenburg [County] that [it] needed to provide notice to all the individuals and schedule any hearings requested."

The trial court filed a written order concluding Petitioner's name should not be included on the RIL due to Respondent's multi-year failure to comply with the requirements of N.C. Gen. Stat. § 7B-320. Respondent appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7B-323(f) and 7A-27(b)(2) (2017).

III. Issue

Respondent argues the trial court erred in concluding Petitioner's name should not be added to the RIL, due to Respondent's failure to comply with the statute and serve notice within five days.

IV. Standard of Review

On appeal from a non-jury trial, this Court reviews a trial court's order to determine "whether there is competent evidence to support the trial court's findings of fact." *Sessler v. Marsh*, 144 N.C App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted). "Findings of fact are binding on appeal if there is competent evidence to support them." *Id.* This Court reviews a trial court's conclusions of law *de novo*. *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001).

V. Analysis

This Court concluded that being listed on an RIL "deprives an individual of the liberty interests guaranteed under our State Constitution." *In re W.B.M.*, 202 N.C. App. 606, 617, 690 S.E.2d 41, 49 (2010). In order to guarantee an individual the right to due process, "an individual has a right to notice and an opportunity to be heard before being placed on the RIL." *Id.* at 621, 690 S.E.2d at 52.

Our General Statutes require that:

> (a) *Within five working days* after the completion of an investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual, the director *shall personally deliver written notice* of the determination to the identified individual.

> (b) If personal written notice *is not made within 15 days of* the determination and the director has made diligent efforts to locate the identified individual, the director *shall send the notice* to the individual by registered or certified mail, return receipt requested, and addressed to the individual at the individual's last known address.

N.C. Gen. Stat. § 7B-320 (2017) (emphasis supplied).

This statute sets forth the specific time limits within which the DSS director must comply to initiate inclusion of an individual's name on the list. Petitioner's notice was not provided within either of the statutory timelines nor within the statute of limitations for a misdemeanor crime. *See* N.C. Gen. Stat. § 15-1 (2017) (two-year statute of limitations). While no appellate case involving this issue has been brought previously, we review other cases under Chapter 7B involving jurisdiction.

This Court considered statutory timelines concerning a petition to terminate parental rights. *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005). The parents argued the trial court lacked *jurisdiction*, because DSS had failed to file the petition seeking termination within the time specified by statute. *Id.* at 353, 607 S.E.2d 700. The statute mandated that DSS:

> shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing *unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.*

Id. at 353, 607 S.E.2d at 701 (citing N.C. Gen. Stat. § 7B-907(e) (2004)) (emphasis supplied). DSS did not file its petition in the case of *In re B.M.* until almost eleven months after the permanency planning hearing, and the trial court made no written findings. *Id.* at 354, 607 S.E.2d at 701. This Court held:

> Mandatory provisions are jurisdictional, while directory provisions are not. Whether the time provision of N.C. Gen. Stat. § 7B-907(e) is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. Generally, statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a

> consequence for failure to comply within the time period. Here, none of the statutes in Chapter 7B address the consequences that would flow from the untimely filing of a petition to terminate parental rights. Significantly, N.C. Gen. Stat. § 7B-907(e) fails to provide a consequence for DSS's failure to comply with the sixty-day filing period. As a result, we conclude that the time limitation specified in N.C. Gen. Stat. § 7B-907(e) is directory rather than mandatory and thus, not jurisdictional.

Id. (citations omitted).

Subsequently, our Supreme Court applied this Court's holding in *In re B.M.* to a case concerning the statutory timelines for filing a petition for juvenile delinquency. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010). The statute at issue provided:

> The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.

Id. (citing N.C. Gen. Stat. § 7B-1703(a) (2007)). In addition to holding the juvenile court counselor complied with the statute, *id.* at 188, 694 S.E.2d at 760, the Supreme Court "conclude[d] that our legislature did not intend the timing requirements of section 7B-1703 to be jurisdictional." *Id.* at 193, 694 S.E.2d at 763.

Here, the Petitioner did not argue nor did the trial court find or conclude that DSS' multi- year delay resulted in a lack of jurisdiction under the statute. This Court previously concluded that being listed on an RIL deprives an individual of a protected liberty interest. *In re W.B.M.*, 202 N.C. App. at 617, 690 S.E.2d at 49. The multi- year delay by DSS, even well beyond the statute of limitations to prosecute for a misdemeanor criminal charge, deprived Petitioner of his ability to mount a defense to preserve his protected liberty interest. *See id.* Here, the delay was nearly four years. Petitioner's arguments are overruled.

VI. Conclusion

Petitioner correctly argued the Respondent's multi-year delay was prejudicial and made "it very difficult for him to present a defense." It is unnecessary on the facts before us to decide whether the timelines

required in section 7B-320 are jurisdictional. The trial court correctly concluded Petitioner's name could not be added to the RIL, due to the prejudice to Petitioner's protected liberty interest from Respondent's long, multi-year delay and failure to timely comply with the specific mandates placed in the statute by the General Assembly. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge BERGER concur.

J. S. & ASSOCIATES, INC., PLAINTIFF
v.
MARIA STEVENSON, DEFENDANT/COUNTERCLAIM PLAINTIFF
v.
J. S. & ASSOCIATES, INC., COUNTERCLAIM DEFENDANT

No. COA18-1065

Filed 7 May 2019

Small Claims—prevailing party—appeal to district court—to bring counterclaims exceeding $10,000—standing

The party that prevailed in a small claims action lacked standing to appeal the judgment to district court in order to bring counterclaims that exceeded the $10,000 amount-in-controversy "ceiling" for small claims courts. The prevailing party's inability to bring her counterclaims in small claims court did not render her an aggrieved party with standing to appeal. Rather, the appropriate avenue to bring her counterclaims was a new, separate action in district court (N.C.G.S. § 7A-219).

Appeal by Defendant from order entered 30 April 2018 by Judge Rebecca Thorne Tin in Mecklenburg County District Court. Heard in the Court of Appeals 27 March 2019.

Dixon Law Firm, PLLC, by Malik Dixon, for the Plaintiff/Counterclaim Defendant-Appellee.

Moore & Van Allen PLLC, by Nathan A. White, for the Defendant/Counterclaim Plaintiff-Appellant.

DILLON, Judge.

This case presents a novel circumstance in which the prevailing party appealed from a small claims court decision in her favor in order to assert related counterclaims in the district court above. Maria Stevenson, Defendant and Counterclaim Plaintiff, appeals from the district court's order dismissing her appeal and its accompanying counterclaims, which were brought for the first time on appeal. Stevenson contends that her appeal rests in a gap between jurisdictional amount in controversy thresholds and the pleading requirements of compulsory counterclaims. After careful review, we find that Stevenson's circumstance is governed by existing law and, therefore, affirm.

I. Background

Beginning in February 2015, Stevenson was a tenant in a home owned by J.S. & Associates, Inc. (hereafter, "JSA"), in Charlotte. The parties' relationship decayed over time due to issues concerning the maintenance of the property.

In November 2017, JSA filed a summary ejectment motion against Stevenson in small claims court.

In December 2017, the trial court entered judgment in Stevenson's favor, denying JSA's request for summary ejectment. Nevertheless, Stevenson appealed the small claims court's judgment to the district court in order to assert counterclaims against JSA, arising from JSA's alleged failure to maintain the rental property. JSA moved to dismiss Stevenson's appeal.

In April 2018, the district court granted JSA's motion to dismiss Stevenson's appeal, holding that Stevenson was not an aggrieved party and, therefore, had no right to appeal the small claims court judgment. Stevenson timely appealed.

II. Analysis

This case presents our Court with a specific issue which we have not been asked to decide before: Where a defendant prevails in an action in small claims court, may she nonetheless bring compulsory counterclaims that exceed the jurisdictional limit of small claims court in an appeal to district court? We hold that this particular circumstance need not be directly provided for, as a proper avenue for redress presently exists.

In North Carolina, small claims courts have jurisdiction over claims for summary ejectment of a tenant, in addition to claims for monetary

damages. N.C. Gen. Stat. § 7A-210(2) (2017). The amount in controversy in an action in small claims court may not exceed ten thousand dollars ($10,000). N.C. Gen. Stat. § 7A-210(1). This amount in controversy "ceiling" is a jurisdictional limitation, *Fickley v. Greystone Enterprises, Inc.*, 140 N.C. App. 258, 261, 536 S.E.2d 331, 333 (2000), which extends to all counterclaims, cross claims, and third-party claims brought in small claims court, *see* N.C. Gen. Stat. § 7A-219 (2017). That is, a defendant in a small claims action is not allowed to bring forth any counterclaim against the plaintiff, cross claim against another defendant, or third-party claim if the defendant's claim "would make the amount in controversy exceed the jurisdictional amount[.]" *Id.*

Appeal to the district court for trial *de novo* is the sole remedy available to an "aggrieved party" in a small claims court action. N.C. Gen. Stat. § 7A-228 (2017); *see 4U Homes & Sales, Inc., v. McCoy*, 235 N.C. App. 427, 436, 762 S.E.2d 308, 314 (2014) (stating that "the only party entitled to invoke the District Court's jurisdiction following a decision by the magistrate in small claims court is an 'aggrieved party' "). And "[o]n appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims[.]" N.C. Gen. Stat. § 7A-220 (2017). That is, when an *aggrieved party* properly brings an appeal from small claims court to district court pursuant to Section 7A-228, the parties may also bring their counterclaims, cross-claims, and third-party claims pursuant to Section 7A-220.

This procedure admittedly leaves open the circumstance before us in this case: What if a party prevails in small claims court, is therefore not an aggrieved party on appeal, but wishes to bring compulsory counterclaims that could not be brought in small claims court because they exceed the jurisdictional limit for amount in controversy? Generally, under Rule 13 of our Rules of Civil Procedure, counterclaims that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim" are compulsory. N.C. R. Civ. P. 13. And compulsory counterclaims must be brought in the same action, or they are lost. *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 597, 614 S.E.2d 268, 271 (2005) ("[I]t is well settled that *absent a specific statutory or judicially determined exception*, a party's failure to interpose a compulsory counterclaim in an action that has been fully litigated bars assertion of that claim in any subsequent action." (emphasis added)).

However, Section 7A-219 makes it clear that counterclaims, even those ordinarily considered compulsory, may be brought in a subsequent,

separate action in district court if and when they would exceed the amount in controversy allowed in small claims court:

> No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate. . . . *Notwithstanding [N.C. R. Civ. P. 13]*, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, *shall not bar* such claims in a separate action.

N.C. Gen. Stat. § 7A-219 (emphasis added). "As a result, a defendant in a summary ejection action who wishes to assert counterclaims that have a value greater than the jurisdictional amount applicable in small claims court may either [1] assert their claims on appeal to the District Court from an *adverse decision* by the magistrate or [2] assert those claims in an entirely separate action." *4U Homes*, 235 N.C. App. at 435, 762 S.E.2d at 314 (2014) (emphasis added).

Here, Stevenson attempted to pursue the first option by appealing the small claims magistrate's decision in her favor. The district court dismissed the appeal, concluding that Stevenson had no right to appeal from a favorable small claims court judgment. We hold that the district court properly identified Stevenson's appropriate avenue for redress.

Stevenson contends that the district court erred in concluding that she was not an aggrieved party, as she was unable to bring her compulsory counterclaims in small claims court below. Stevenson's counterclaims are arguably compulsory and certainly exceed the ten thousand dollar ($10,000) threshold for an action in small claims court. *See Cloer v. Smith*, 132 N.C. App. 569, 574-5, 512 S.E.2d 779, 782 (1999).

We conclude that Stevenson's inability to bring her counterclaims does not render her an aggrieved party where she prevailed in small claims court. Our Supreme Court has generally defined a "person aggrieved" as a party "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963). Here, Stevenson is not an aggrieved party because she is still free to seek appropriate redress for her claims against JSA by bringing a separate action. *4U Homes*, 235 N.C. App. at 436-7, 762 S.E.2d at 314-5 (holding that the defendant was not an aggrieved party and could not appeal to district court from

a small claims court decision in her favor where she could still seek additional damages by bringing her counterclaims in a separate action).

Further, Section 7A-219 specifically provides that counterclaims which exceed the statutory amount in controversy threshold of small claims court may be brought in a separate action in district court "*notwithstanding [Rule 13]*."[1] Therefore, if Stevenson brings her claims in a separate action in district court, any motion made by JSA to dismiss Stevenson's counterclaims as compulsory pursuant to Rule 13 would be properly denied.

We hold that the district court did not err in dismissing Stevenson's appeal. Stevenson is not an aggrieved party and therefore does not have standing to bring an appeal to the district court from the small claims court's order in her favor. Stevenson's proper course of action is to bring her counterclaims in a new action.

AFFIRMED.

Judges BRYANT and ARROWOOD concur.

1. We note a decision from our Court which suggests that a defendant who is an aggrieved party in a small claims court action *must* bring an appeal to assert counterclaims rather than through a separate action. *Fickley v. Greystone*, 140 N.C. App. 258, 261, 536 S.E.2d 331, 333 (2000) (dismissing separate action where plaintiff should have brought claims by asserting counterclaims in an appeal from a prior small claims court action). But *Fickley* does not apply in the present case as Stevenson was not an aggrieved party.

K4C6R, LLC v. ELMORE

[265 N.C. App. 204 (2019)]

K4C6R, LLC, PORTERS NECK PLANTATION, INC. AND
FOREST CREEK PLANTATION, INC., PLAINTIFFS
v.
JOHN A. ELMORE, II, PORTERS NECK COMPANY, INC., AND
FOREST CREEK VENTURES, INC., DEFENDANTS

No. COA18-1008

Filed 7 May 2019

1. Contracts—right of first refusal—triggering conditions—interpretation

The trial court erred in an action for declaratory judgment and breach of contract by interpreting a right of first refusal (ROFR) clause regarding third-party offers for undeveloped land as triggering a party's ROFR only if an offer for both developed and undeveloped land specified what amount of the offer price was allocated to the undeveloped land. Such an interpretation was inconsistent with the plain language and purpose of the agreement as a whole and contradicted another of the court's conclusions.

2. Contracts—right of first refusal—limitations—cash-only sales—plain language of agreement

The trial court correctly concluded that a right of first refusal clause in a real estate agreement applied only to cash-only sales based on the plain language of the agreement.

3. Contracts—right of first refusal—limitations—offers involving seller-financing—plain language of agreement

The trial court correctly concluded that a right of first refusal clause in a real estate agreement did not apply to offers involving seller-financing based on the plain language of the agreement.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendants from order entered 29 December 2017 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 27 March 2019.

Murchison, Taylor & Gibson PLLC, by Andrew K. McVey, for plaintiff-appellees.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for defendant-appellants.

ARROWOOD, Judge.

John A. Elmore, II ("Mr. Elmore"), Porters Neck Company, Inc. ("PNC"), and Forest Creek Ventures, Inc. ("FCV") (collectively, "defendants") appeal from an order denying their motion for summary judgment in part, and granting it in part. For the reasons stated herein, we affirm in part, and reverse in part.

I. Background

Mr. Elmore and Mr. Lionel L. Yow, Jr. ("Mr. Yow") formed PNC in or about 1991 to own and develop residential real property in Porters Neck. Thereafter, Mr. Elmore and Mr. Yow formed FCV to own and develop residential real property in Forest Creek. Mr. Yow filed for bankruptcy in 2011. During the administration of the bankruptcy, K4C6R, LLC ("K4C6R") successfully bid on Mr. Yow's interest in PNC and FCV, resulting in Mr. Elmore and K4C6R each owning fifty percent (50%) of PNC and FCV.

Due to disputes between the two owners, the parties executed a written contract (the "division agreement") the intent of which was to distribute half of the real estate assets each to Mr. Elmore and to K4C6R respectively. To that end, the division agreement distributed fifty percent (50%) of PNC and FCV's assets to K4C6R in exchange for its shares of stock in the PNC and FCV companies. Porters Neck Plantation, Inc. ("PNP") was established as K4C6R's successor entity with respect to the properties in Porters Neck that K4C6R received in the division, and Forest Creek Plantation, Inc. ("FCP") was established as K4C6R's successor entity with respect to its properties in Forest Creek. The division agreement contained a right of first refusal ("ROFR"), which provides:

> K4C6R, on the one hand, and PNC and FCV, on the other, each grants the other a right of first refusal with respect to the sale of the undeveloped Forest Creek property, to be triggered by a bona fide third[-]party offer to purchase the undeveloped property, provided, however, that this right of first refusal shall apply only to cash-only sales.

On or about 30 September 2015, FCP received an offer to purchase all of FCP's developed and undeveloped property ("the third-party offer" or "the offer"). Although the ROFR is only for undeveloped Forest Creek property, the third-party offer did not allocate the amount being offered for the undeveloped property. FCP forwarded the offer to defendants, who inquired what portion of the offer was allocated to undeveloped

property. FCP did not provide this information, and defendants did not waive the ROFR rights or make an offer. Eventually, the offer expired.

On 2 May 2016, K4C6R, FCP, and PNP (collectively, "plaintiffs") filed a complaint against defendants seeking declaratory judgment as to the parties' rights under the division agreement and injunctive relief, and to recover damages for breach of contract.

Defendants answered the complaint and filed counterclaims on or about 9 September 2016. Plaintiffs answered the counterclaims on 10 November 2016. On 20 November 2016, defendants moved for summary judgment. The matter came on for hearing before the Honorable Charles H. Henry on 6 December 2017, in New Hanover Superior Court.

The trial court entered an order on 29 December 2017 granting summary judgment in part and denying it in part. Conclusion of law 5 of the order interprets the division agreement's ROFR as follows.

> a. That the right of first refusal possessed by Porters Neck Company Inc. and Forest Creek Ventures, Inc. is limited to offers that contemplate the cash sale of undeveloped property within the Forest Creek subdivision or the cash sale of developed property and undeveloped property within the Forest Creek subdivision where the offer delineates the amount of the offer that pertains to the undeveloped property. This same interpretation applies to K4C6R's right of first refusal as well.
>
> b. The Division Agreement requires that in order to entertain any "cash only" offers that contemplate the sale of any undeveloped property, the offeror must allocate the amount being offered for the undeveloped property so a party can decide whether to exercise its right of first refusal.
>
> c. If presented with a cash offer to purchase undeveloped property within the Forest Creek subdivision by a bona fide third[-]party, Porters Neck Company Inc. and Forest Creek Ventures, Inc. will have thirty days to exercise their right of first refusal. This same time limitation applies to K4C6R's right of first refusal as well.
>
> d. There exists no right of first refusal in which the seller finances all of the purchase price of the undeveloped land.

The 29 December 2017 order did not determine all of the claims involved in the action. The remaining claims came on for trial before the Honorable Anna Mills Wagoner at the 19 March 2018 civil jury term in New Hanover Superior Court. The trial court entered an order concluding all claims in dispute between the parties on 5 April 2018.

Defendants filed notice of appeal from the Honorable Judge Charles H. Henry's order on 4 May 2018.

II. Discussion

On appeal, defendants argue the trial court erroneously interpreted the ROFR in its 29 December 2017 order because: (1) conclusion of law 5(a) could be read to hold the ROFR applies to offers to purchase both developed and undeveloped land *only if* the offer specifies the amount designated to purchase the undeveloped property; (2) the parties' ROFR is not limited to cash payment offers; and (3) the division agreement does not state that there is no ROFR if the seller finances all of the purchase price of the undeveloped land. We address each argument in turn.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

"The construction of a contract is a matter of law for the courts when the language is plain and unambiguous." *Gillespie v. DeWitt*, 53 N.C. App. 252, 266, 280 S.E.2d 736, 746 (citations omitted), *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981). Where, as here, the parties "differ as to the interpretation of language[,]" the language can still be unambiguous. *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996).

The parties do not dispute that the division agreement's provision for a ROFR is unambiguous. We agree. The division agreement provides:

> K4C6R, on the one hand, and PNC and FCV, on the other, each grants the other a right of first refusal with respect to the sale of the undeveloped Forest Creek property, to be triggered by a bona fide third[-]party offer to purchase the undeveloped property, provided, however, that this right of first refusal shall apply only to cash-only sales.

In other words, this provision grants each party a ROFR with respect to the sale of undeveloped Forest Creek property that is triggered by

a bona fide third-party offer to purchase the undeveloped property. It does not limit the ROFR to situations where the third-party only offers to purchase undeveloped property. Therefore, a party is not deprived of its ROFR when a third-party offers for both undeveloped and developed Forest Creek property in the same offer. Further, if a third-party does offer for both undeveloped and developed Forest Creek property, that third-party must specify which portion of its offer is allocated for the undeveloped property so that K4C6R on the one hand, and PNC and FCV on the other, have the opportunity to exercise its ROFR as to the undeveloped Forest Creek property. The division agreement then limits this right by utilizing the limiting language "provided, however," explaining that the ROFR is only triggered by cash only sales.

A. Third-Party Offers for Both Developed and Undeveloped Land

[1] As defendants' first issue on appeal, they contend conclusion of law 5(a) is in error because it could be read to hold the ROFR applies to offers to purchase both developed and undeveloped land *only* if the offer allocates the amount of the offer offered to purchase the undeveloped property, even though the division agreement does not contain this limitation. We agree.

According to conclusion of law 5(a),

> the right of first refusal possessed by Porters Neck Company Inc. and Forest Creek Ventures, Inc. is limited to offers that contemplate the cash sale of undeveloped property within the Forest Creek subdivision or the cash sale of developed property and undeveloped property within the Forest Creek subdivision *where the offer delineates the amount of the offer that pertains to the undeveloped property*. This same interpretation applies to K4C6R's right of first refusal as well.

(Emphasis added). Because this conclusion states that the ROFR is limited to: (1) a third-party offer only for undeveloped land; or (2) a third-party offer for both undeveloped and developed land where the offer allocates the amount offered to purchase the undeveloped property, the conclusion erroneously suggests that the division agreement does not provide a ROFR if a third-party offer for both undeveloped and developed land fails to delineate the amount of the offer that pertains to the undeveloped property. This interpretation of the ROFR would go against the purpose of the ROFR, contradict the plain language of the division agreement, and conflict with conclusion of law 5(b).

The purpose of the ROFR in the division agreement is to give either party the right to purchase undeveloped property before it can be sold to a third-party. The plain language of the division agreement supports this purpose, and does not limit offers for both undeveloped and developed land to those offers that allocate the amount of the offer intended to purchase the undeveloped property. Such a limitation cannot be read into the division agreement. Otherwise, a party could be deprived of their ROFR simply by the third-party offeror offering for both undeveloped and developed land, and failing to allocate the funds offered between the two types of land. This result would create a loophole in conflict with conclusion of law 5(b), which concludes: "The Division Agreement requires that in order to entertain any 'cash only' offers that contemplate the sale of any undeveloped property, the offeror must allocate the amount being offered for the undeveloped property so a party can decide whether to exercise its right of first refusal."

Therefore, because we agree with defendant that there is a potential for conclusion of law 5(a) to be read as causing the order to be inconsistent both with the agreement's purpose, plain language, and conclusion of law 5(b), we hold that to the extent conclusion of law 5(a) could be read to say the ROFR applies to offers to purchase both developed and undeveloped land only if the offer delineates the amount designated to the undeveloped property, it is reversed. In all other respects, it is affirmed.

B. Cash Sales

[2] Next, defendants argue the trial court's conclusion of law 5(a) that the parties' ROFR is limited to third-party offeror's cash payment offers is erroneous because the division agreement's provision that the "right of first refusal shall apply only to cash-only sales" should be interpreted to mean that the party exercising the ROFR must pay cash to purchase the property at issue. We disagree.

The plain language of the division agreement's requirement that the "right of first refusal shall apply only to cash-only sales" clearly provides that the parties' ROFR only applies when a third-party offeror makes a cash offer to purchase undeveloped property. Defendants' argument that this plain language interpretation undermines the parties' intent is without merit. "The intent of the parties is determined by examining the plain language of the contract[,]" *Brown v. Ginn*, 181 N.C. App. 563, 567, 640 S.E.2d 787, 790, *disc. rev. denied*, 361 N.C. 350, 645 S.E.2d 766 (2007), which, here, plainly limits the ROFR's applicability to cash only sales. Accordingly, defendants' argument is without merit.

C. Seller-Financing

[3] Because the trial court did not err in concluding that the division agreement limits the parties' ROFR to third-party offers of cash payment, it follows that defendants' third argument, that the trial court erred by limiting the parties' right of first refusal to offers not involving seller-financing, as described by conclusion of law 5(d), is without merit. The agreement explicitly limits the ROFR's applicability to cash only sales; thus, there exists no right of first refusal in which the seller finances all of the purchase price of the undeveloped land.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order in part, and reverse in part to the extent that conclusion of law 5(a) could be read to hold that the division agreement's ROFR only applies to offers to purchase *both* developed and undeveloped property *only if* the offer delineates the amount designated to the undeveloped property.

AFFIRMED IN PART, REVERSED IN PART.

Judge BRYANT concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

Plaintiff and Defendant were partners in a partially-developed subdivision, known as Forest Creek.[1] Because of a dispute, the parties entered into a division agreement which provided, in relevant part, that each would receive about half of the developed and undeveloped properties in Forest Creek. The division agreement contained a right of first refusal ("ROFR"), to apply to "cash-only sales" of the "undeveloped Forest Creek property." That is, the ROFR granted each party the first right to purchase the other party's undeveloped property in Forest Creek should the other party ever decide to sell it. The ROFR did not apply to any of the developed property. Sometime later, Plaintiff received an offer from a third party to purchase both its *developed and undeveloped* Forest Creek property. A question presented is whether such an offer triggers the ROFR.

1. They were also partners in another subdivision, which is not the subject of this present dispute.

The majority holds that the ROFR is triggered where Plaintiff agrees to sell its undeveloped property (burdened by the ROFR) along with its developed property (unburdened by the ROFR) to a third party; that, to exercise the ROFR, Defendant is only required to purchase Plaintiff's undeveloped property; and that, to accommodate Defendant's purchase, should Defendant exercise its ROFR, Plaintiff and the third party must delineate what portion of the purchase price in their contract is attributable to the undeveloped property.

I agree that the ROFR is triggered where Plaintiff agrees to sell its undeveloped property as part of a package deal to a third party, but I disagree with the remedy fashioned by the majority. For the reasons stated below, I conclude that, to exercise the ROFR, Defendant must generally match the third-party offer, by agreeing to purchase both Plaintiff's developed and undeveloped properties, for the price agreed to in the third-party offer. But if Defendant can show that the packaging of the properties was done by Plaintiff in bad faith, the Defendant may exercise its ROFR by purchasing the undeveloped property alone for its fair market value.

The majority further holds that the ROFR is *never* triggered where the third-party offer involves any amount of seller financing, based on the "cash-only" language. Though I generally agree with the majority on this point, for the reasons stated in section II. below, I conclude that the ROFR may *also* be triggered where a financing provision is included by Plaintiff in a deal with a third-party in bad faith.

I. Right of First Refusal

North Carolina allows ROFR's, also known as preemptive rights. *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980). However, to be enforceable, the ROFR must be "reasonable," as a ROFR is a restraint on alienation, which are generally disfavored in the law. *Id.* at 62, 269 S.E.2d at 611.

North Carolina has yet to opine as to whether and how a ROFR is triggered when "the owner of the property attempts to sell [the property burdened by the ROFR] as part of a larger package of properties and the preemptive right agreement is silent on this matter." 1 Webster's Real Estate Law in North Carolina § 9.04 (2017). Nationally, "[c]ourts have chosen from among five different forms of relief in resolving [this] problem." Bernard Daskal, *NOTE: RIGHTS OF FIRST REFUSAL AND THE PACKAGE DEAL*, 22 Fordham Urb. L.J. 461, *469 (1995).

One approach, followed most notably by the Nevada Supreme Court, holds that the ROFR is not triggered at all where the owner of land burdened by a ROFR contracts to sell the land with other land: the right-holder precludes himself from exercising such a right by failing to account for this situation in the agreement which grants him the ROFR. *See Crow-Spieker v. Helms Constr.*, 731 P.2d 348 (Nev. 1987). One criticism with this approach is that a seller of burdened property could avoid triggering the ROFR when selling burdened property by simply including some nominal, unburdened property as part of the deal with the third-party offeror, thereby bypassing the obligation of having to offer the property first to the right-holder.

A second approach also holds that the ROFR is not triggered *but that* the right-holder does have the right to enjoin the sale to the third-party. *See*, *e.g.*, *Manella v. Brown Co.*, 537 F. Supp. 1226, 1229 (D. Mass. 1982); *see also Chapman v. Mutual Life Ins. Co.*, 800 P.2d 1147, 1152 (Wyo. 1990); *Myers v. Lovetinsky*, 189 N.W.2d 571, 576 (Iowa 1971). That is, under this approach, the ROFR right-holder would have no right to purchase the burdened land; but he could seek an injunction to prevent the seller from selling to a third party. This approach, though, heightens the restraint on alienation. It may be that the seller *wants* to sell all his property, not just the burdened portion, or may have a difficult time selling all his property if it must be broken up. Further there may be an economic benefit of selling the burdened property with the unburdened property that would be lost if the seller was not able to sell all his property to a single buyer.

The third approach recognizes that the ROFR is triggered and that the right-holder's remedy is to seek specific performance to purchase the burdened property *without having any obligation to purchase the unburdened property*. *See*, *e.g.*, *Pantry Pride Enters. v. Stop & Shop Cos.*, 806 F.2d 1227, 1229 (4th Cir. 1986); *see also Berry-Iverson Co. v. Johnson*, 242 N.W.2d 126, 134 (N.D. 1976). However, jurisdictions following this approach differ on *how* to establish the price for the burdened land alone, since triggering offers from third parties often do not break down the price between the burdened and unburdened properties. *Id.* For instance, a California court has held that, to exercise his ROFR in the burdened property, the price to be paid by the right-holder is its fair market value, irrespective of whether the third party offered a fair market value for the entire package. *See Maron v. Howard*, 258 Cal App. 2d 473, 488 (1968). The Michigan Supreme Court, though, has held that the right-holder must pay the pro rata portion attributable to

the burdened property of the price offered by the third party for the entire package.[2]

It is this third approach which the majority follows in the present case. However, I have not found a case which follows the approach the majority takes in *establishing the price* Defendant must pay for the burdened property to exercise its ROFR. Specifically, the majority directs Plaintiff and the third-party offeror to determine which portion of the purchase price in the triggering offer is attributable to the burdened property. This approach is problematic, in my view, for a number of reasons. First, Plaintiff could easily thwart Defendant's right simply by attributing an unreasonably greater portion of the purchase price to the burdened property. On the other hand, even if Plaintiff made an "honest" pro rata delineation, this approach fails to recognize the possibility that Plaintiff was willing to sell multiple properties at a discount if sold together. *See, e.g.*, *Smith v. Troxler*, 90 S.E.2d 482, 488 (S.C. 1955) (stating that a seller should "not be compelled to sell one of these lots if he only desired to sell them as a whole").

The fourth approach[3] is similar to the third approach, recognizing that the ROFR provision is triggered, but that the right-holder must agree to purchase the *entire package of properties*, even those not burdened by the ROFR. *See Capalongo v. Giles*, 425 N.Y.S.2d 225, 228 (N.Y. Sup. Ct. 1980), *rev'd on other grounds* 425 N.Y.S.2d 225 (1981); *see also First Nat'l Exch. Bank v. Roanoke Oil Co., Inc.*, 192 S.E. 764 (Va. 1937) (recognizing the right-holder's right to purchase the burdened and unburdened lands where a third party has offered to purchase both as a package). This approach, in essence, applies a "mirror image" rule. *See Bramble v. Thomas*, 914 A.2d 136, 144 (Md. Ct. App. 2007) (applying "mirror image

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2. Suppose that a third party offered the seller $3 million for burdened and unburdened property and suppose that the unburdened property was worth twice as much as the burdened property. Under the California approach, the right-holder would have the right to purchase the burdened property for its fair market value, taking no account of the $3 million offer. Under the Michigan approach, the right-holder would have the right to purchase the burdened property for $2 million, as this assumes that $2 million of the purchase price is attributable to the burdened property and $1 million is attributable to the unburdened property.

3. The law review article cites this fourth approach as its fifth approach. The article describes as its fourth approach the remedy generally available in any contract claim, the right to seek monetary damages rather than specific performance, citing a Kansas Supreme Court opinion. *Anderson v. Armour & Co.*, 473 P.2d 84, 89 (Kan. 1970). I believe that this remedy is available in lieu of specific performance, where a ROFR provision as been breached.

rule" to the exercise of a ROFR); *Miller v. LeSea Broad*, 87 F.3d 224, 226 (7th Cir. 1996) (endorsing a mirror image rule in the context of a ROFR).

For the following reasons, I believe that this fourth approach is more in harmony with North Carolina law. To be sure, this issue is one of first impression in North Carolina. And in fashioning a rule, we must remember that ROFR's are restraints against alienation, which are generally disfavored in our State. *See Smith*, 301 N.C. at 62, 269 S.E.2d at 611. We must also remember that any seller who attempts to sell land burdened by a ROFR to a third party has a duty of good faith and fair dealing to the right-holder. *See, e.g.*, *Blondell v. Ahmed*, 247 N.C. App. 480, 484, 786 S.E.2d 405, ___ (2016), *aff'd per curiam*, 370 N.C. 82, 804 S.E.2d 183 (2017) (recognizing that every contract includes an implied covenant of good faith and fair dealing).

I conclude that a right-holder must match *all* of the terms of the third-party offer, applying a "mirror image" rule, *unless* the landowner packages the burdened property with unburdened property in bad faith. *See Weber v. Wilde*, 575 P.2d 1053, 1055 (Utah 1978) (implying that when terms are added in good faith to a triggering offer, and not with the ulterior purpose of defeating a ROFR, the terms of the triggering offer must be matched exactly); *Brownies Creek v. Asher Coal*, 417 S.W.2d 249, 252 (Ky. 1967) (holding that the "defeat of the [ROFR] should not be allowed by use of special, peculiar terms or conditions not made in good faith"). This approach recognizes our policy that ROFR's should be construed as to provide the least impediment on a seller's right to alienate property. Also, this approach is harmonious with the general contract principle that a "meeting of the minds [] requires an offer and acceptance in the exact terms[.]" *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985). And, at the same time, this approach recognizes that any contract provision contains an implied duty of good faith and fair dealing.

Therefore, I conclude that in the present case, where the ROFR provision is silent on package sales, there is a strong presumption that Defendant may only exercise its ROFR by matching the terms of the triggering offer. 1 Webster's Real Estate Law in North Carolina § 9.04 (2017) (defining a preemptive right as the right-holder having the right "*to match* bona fide offers" (emphasis added)). But I also conclude that this presumption may be overcome by Defendant—whereby Defendant may be allowed to exercise the ROFR by purchasing *only* the burdened property – if it shows that Plaintiff packaged the burdened property with the unburdened property in bad faith.

II. "Cash-Only"/Seller Financing

The majority concludes that the ROFR is only triggered by third-party offers that are for cash; i.e., offers that do not require a trade or any amount of seller financing. It could be argued that the "cash-only" provision in the ROFR at issue does not prevent the ROFR from triggering where a triggering offer includes seller financing, but that the "cash-only" language only requires that Defendant make a cash tender of equal value to properly exercise the ROFR. But it could also be argued that the parties meant for the ROFR to be triggered only where Plaintiff has accepted a "cash-only" offer because there may be situations where Plaintiff may want to employ seller financing for a portion of the price for tax reasons or other reasons. This ambiguity should be resolved by strictly construing the provision against creating a restraint on alienation. As such, I *generally* agree with the majority that the ROFR is only triggered where the third-party offer is a cash-only offer. But I conclude that the ROFR may *also* be triggered even where a third-party offer is not for all cash *if* the alternate form of payment in the triggering offer is included in bad faith. In such case, Defendant should be allowed to purchase the property for an equivalent value in cash.

I do note that the trial court's conclusions are inconsistent. Specifically, while paragraph 5(a) of the order concludes that only cash sales trigger the ROFR, 5(d) concludes that the ROFR fails to trigger only where "the seller finances *all of the purchase price*[.]" That is, 5(a) restricts the right of first refusal to cash-only deals, but 5(d) seems to allow for the ROFR to be triggered even where the seller agrees to finance a portion (but not all) of the purchase price. I would reverse these inconsistent conclusions based on my view that only cash sales trigger the ROFR, except where a non-cash tender provision is included in a triggering offer in bad faith.

McCULLERS v. LEWIS

[265 N.C. App. 216 (2019)]

BRITTNEY McCULLERS; AND RACHEL GOODLING, AS GUARDIAN AD LITEM FOR THE MINOR CHILD BRI'NAJASHA McCULLERS, PLAINTIFFS
v.
TAYLORIA LEWIS, IN HER INDIVIDUAL CAPACITY, AND MICHAEL AYODELE, IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. COA18-825

Filed 7 May 2019

1. Appeal and Error—interlocutory appeal—motions to dismiss—Rule 28—substantial right

In a torts action against two public housing managers—who appealed the denial of their motions to dismiss on estoppel grounds and under Rules 12(b)(1), 12(b)(2), and 12(b)(6)—only the denial of the managers' Rule 12(b)(2) motion was immediately appealable because it was the only one mentioned in their statement of the grounds for appellate review (N.C. R. App. P. 28(b)). Moreover, the denial of their Rule 12(b)(2) motion premised on public official immunity constituted an adverse ruling on personal jurisdiction, thereby affecting a substantial right.

2. Immunity—public official immunity—motion to dismiss—intentional tort claim—punitive damages

In a torts action against two public housing managers asserting public official immunity, the trial court properly denied the managers' motion to dismiss plaintiffs' cause of action for intentional infliction of emotional distress (IIED)—an intentional tort—because public official immunity may only insulate public officials from allegations of mere negligence. Additionally, because plaintiffs could establish a right to punitive damages if they succeeded in litigating their IIED claim, the managers' motion to dismiss plaintiffs' claim for punitive damages was also properly denied.

3. Immunity—public housing managers—public official immunity

In a torts action against two public housing managers with the Raleigh Housing Authority (RHA), the managers were "public officials" for immunity purposes where the RHA clearly delegated its statutory duties to the managers, and where the managers exercised a portion of the RHA's sovereign powers under N.C.G.S. § 157-9 and performed discretionary duties when overseeing housing projects. Therefore, public official immunity shielded the managers from plaintiffs' claims based in negligence where the managers acted

neither outside the scope of their official authority nor with malice when they declined to move plaintiffs to another apartment.

Appeal by Defendants from order entered 10 May 2018 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 March 2019.

Legal Aid of North Carolina, Inc., by Thomas Holderness, Hannah Guerrier, and Janet McIlwain, for Plaintiffs-Appellees.

The Francis Law Firm, PLLC, by Charles T. Francis and Ruth A. Sheehan, for Defendants-Appellants.

COLLINS, Judge.

Defendants Tayloria Lewis and Michael Ayodele appeal from an order denying their motions to dismiss Plaintiffs' complaint under North Carolina Rule of Civil Procedure 12 and on estoppel grounds. Defendants contend that the trial court erred by failing to conclude that (1) Defendants were shielded from suit by the doctrines of sovereign immunity and governmental immunity and (2) this lawsuit is an improper collateral attack on the decision of another trial court judge not to allow Defendants to be joined in a separate proceeding. We dismiss in part, affirm in part, and reverse in part.

I. Background

On 29 November 2017, Plaintiffs filed their complaint in Wake County Superior Court against Defendants, who both work for the Raleigh Housing Authority ("RHA"). In their complaint, Plaintiffs seek damages in connection with Defendants' alleged failure to transfer Plaintiffs to another apartment following various issues Plaintiffs allege to have experienced at their RHA-administered apartment, and bring causes of action for (1) intentional infliction of emotional distress, (2) negligent infliction of emotional distress, and (3) negligence, as well as a claim for (4) punitive damages.

On 19 February 2018, Defendants filed motions to dismiss the complaint under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6) (2017), and on estoppel grounds, as well as an answer to the complaint. Defendants' motions were heard on 26 April 2018, and on 10 May 2018 the trial court denied Defendants' motions in full. Defendants timely appealed to this Court on 8 June 2018.

II. Appellate Jurisdiction

[1] We first address whether this Court has jurisdiction to hear Defendants' appeal from the trial court's denials of their motions to dismiss.

The trial court's denials of Defendants' motions to dismiss are interlocutory orders from which there is generally no right of immediate appeal. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, the North Carolina General Statutes set forth certain circumstances in which litigants like Defendants who are subject to an interlocutory order may immediately appeal, including when an interlocutory order "[a]ffects a substantial right," N.C. Gen. Stat. §§ 1-277(a) (2017), 7A-27(b)(3)(a) (2017), or makes an adverse ruling as to personal jurisdiction, N.C. Gen. Stat. § 1-277(b) (2017). North Carolina Rule of Appellate Procedure 28(b) sets forth the required contents for an appellant's brief, including the requirement of stating the grounds for appellate review, and specifically sets forth that "[w]hen an appeal is interlocutory, the statement [of grounds for appellate review] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4) (2018).

Defendants made motions to dismiss the complaint under Rules 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and 12(b)(6) (failure to state a claim upon which relief can be granted), as well as on estoppel grounds, all of which were denied by the trial court in its interlocutory order. But as a threshold matter, the statement of the grounds for appellate review in Defendants' brief only argues that the trial court's denial of its Rule 12(b)(2) motion affects a substantial right. Defendants thus fail to satisfy their burden under Appellate Rule 28(b) as to all but their Rule 12(b)(2) argument, which renders Defendants' appeal of the denial of their Rule 12(b)(1), Rule 12(b)(6), and estoppel motions all subject to dismissal. *See Bezzek v. Bezzek*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2019 N.C. App. LEXIS 121, *3 (2019) ("When an appeal is interlocutory and not certified for appellate review pursuant to Rule 54(b), the appellant must include in the statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. Otherwise, the appeal is subject to dismissal.").

Even had Defendants' brief complied with Appellate Rule 28(b), their appeal of the denial of their Rule 12(b)(1), 12(b)(6), and estoppel

motions would still be dismissed. Regarding the estoppel motion, the denial of a motion to dismiss affects a substantial right when the motion to dismiss "makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Fox v. Johnson*, 243 N.C. App. 274, 281, 777 S.E.2d 314, 321 (2015). Here, Defendants nowhere asserted that the prior action upon which they base their estoppel motion has reached final judgment on the merits, and as such, Defendants failed to make the colorable assertion necessary to claim that the denial of their estoppel motion affects a substantial right. *See Bishop v. Cty. of Macon*, 250 N.C. App. 519, 523, 794 S.E.2d 542, 547 (2016) (elements of collateral estoppel, including "a prior suit resulting in a final judgment on the merits"). The trial court's denial of Defendants' estoppel motion is therefore interlocutory and not appealable, and Defendants' appeal thereof is accordingly dismissed.

This Court's decision in *Can Am South, LLC v. State*, 234 N.C. App. 119, 759 S.E.2d 304 (2014), is instructive regarding the Rule 12 motions. In *Can Am*, as here, the defendants moved to dismiss the plaintiff's claims under Rules 12(b)(1) and (2), but not under Rule 12(b)(6), "based on the defense of sovereign immunity," and moved to dismiss under Rule 12(b)(6) "for failure of the complaint to adequately plead." *Id.* at 122, 759 S.E.2d at 307. The *Can Am* Court dismissed the appeal because the denial of the defendants' Rule 12(b)(6) motion "involve[d] neither a substantial right under section 1-277(a) nor an adverse ruling as to personal jurisdiction under section 1-277(b), and thus is not immediately appealable[.]" *Id.* at 124, 759 S.E.2d at 308. Concerning the sovereign-immunity-based motions, the *Can Am* Court said that "[a] denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right [and is] not immediately appealable under section 1-277(a)," but that "denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* at 122-24, 759 S.E.2d at 307-08 (citations omitted).

Here, following *Can Am*, Defendants' appeal of the denials of their Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss are not immediately appealable and thus not properly before us, and are dismissed. However, as Defendants correctly argue, the denial of their Rule 12(b)(2) motion to dismiss is an adverse ruling on personal jurisdiction. Thus Defendants' appeal thereof is properly before us pursuant to N.C. Gen. Stat. § 1-277(b) and we will determine whether the trial court erred in denying that motion.

III. Standard of Review

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (discussing various procedural contexts). "[U]pon a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of making out a *prima facie* case that jurisdiction exists." *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010) (internal citation omitted). Where, as here, the defendant "supplements his motion to dismiss with an affidavit or other supporting evidence,"[1] the plaintiff cannot rest on the unverified allegations in the complaint; rather, the plaintiff "must respond by affidavit or otherwise . . . setting forth specific facts showing that the court has [personal] jurisdiction." *Banc of Am.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83; *Bauer*, 207 N.C. App. at 69, 698 S.E.2d at 761 (internal quotation marks, brackets, and citation omitted). If the plaintiff offers no evidence in response, the court considers (1) any allegations in the complaint that are not controverted by the defendant's evidence and (2) all facts in the defendant's evidence, which are uncontroverted because of the plaintiff's failure to offer evidence in response (here, the "Trial Record"). *Banc of Am.*, 169 N.C. App. at 693-94, 611 S.E.2d at 183.

Generally, when this Court reviews a trial court's denial of a Rule 12(b)(2) motion to dismiss, it considers whether the trial court's findings of fact are supported by competent evidence in the record; if so, the findings of fact are conclusive on appeal. *Inspirational Network*, 131 N.C. App. at 235, 506 S.E.2d at 758. Under N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2017), however, the trial court is not required to make specific findings of fact unless a party so requests. *Banc of Am.*, 169 N.C. App. at 694, 611 S.E.2d at 183. Where, as here, the record contains no indication that the parties requested that the trial court make specific findings of fact, and the order appealed from contains no findings, we presume

1. Defendants' memorandum in support of their motions to dismiss appended a number of exhibits, most notably "job description[s]" describing the duties of those who hold the positions at RHA that Defendants allegedly held. The record does not reflect any objection by Plaintiffs to Defendants' submission of these documents, or to any use thereof, and Plaintiffs themselves cite to these documents in their appellate brief in describing Defendants' duties at RHA. As such, any argument that these documents do not accurately describe Defendants' duties at RHA is waived, *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 238-39, 506 S.E.2d 754, 759-60 (1998), and we presume that the trial court considered these documents as accurately describing Defendants' duties.

that the trial court made factual findings sufficient to support its ruling, and it is this Court's task to review the record to determine whether it contains evidence that would support the trial court's legal conclusions, *Banc of Am.*, 169 N.C. App. at 695, 611 S.E.2d at 183, and to review the trial court's legal conclusions *de novo*, *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 278, 646 S.E.2d 129, 133 (2007).

III. Analysis

[2] In their Rule 12(b)(2) motion to dismiss, Defendants state, in relevant part, that the trial court "lacks . . . personal jurisdiction over them on the basis that they are or were public employees or public officials at all times pertinent to this action and [were] therefore cloaked with sovereign or governmental immunity." By denying this motion, the trial court implicitly found facts supporting its implicit general conclusion that Defendants were subject to personal jurisdiction, and its implicit specific conclusion that Defendants could not shield themselves from suit via the doctrines of sovereign or governmental immunity.

As a technical matter, neither doctrine can itself protect Defendants, since sovereign immunity and governmental immunity only apply in actions brought against state and local governments, respectively, and not in actions brought against individuals like Defendants. *See Wray v. City of Greensboro*, 370 N.C. 41, 47-48, 802 S.E.2d 894, 898-99 (2017) (describing sovereign and governmental immunity). But Defendants' Rule 12(b)(2) motion claims they are immune by virtue of their claimed status as "public officials," which refers to a related doctrine known as public official immunity.[2]

Public official immunity is a " 'derivative form' of governmental immunity" that insulates a public official from personal liability for mere negligence in the performance of his duties unless his alleged actions were malicious or corrupt or fell outside and beyond the scope of his duties. *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) (citation omitted); *Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000).

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2. Given the close relationship between the governmental immunity doctrine and the public official immunity doctrine, *Fullwood*, 250 N.C. App. at 38, 792 S.E.2d at 550 ("The defense of public official immunity is a 'derivative form' of governmental immunity" (citation omitted)), the fact that Defendants alleged their status as "public officials" in the text of the motion, and the fact that Plaintiffs raised no objection in their brief, N.C. R. App. P. 28(a), we consider Defendants' Rule 12(b)(2) motion to have stated a defense under the public official immunity doctrine.

This definition is dispositive as to one aspect of this case. Since public official immunity may only insulate public officials from allegations of mere negligence, only those of Plaintiffs' causes of action sounding in negligence come within the doctrine's reach. Accordingly, we affirm the trial court's denial of Defendants' motion to dismiss Plaintiffs' first cause of action for intentional infliction of emotional distress, which is an intentional tort claim. *See Hawkins v. State*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242 (1995) (affirming trial court's denial of motion to dismiss intentional infliction of emotional distress claim on public official immunity grounds). Moreover, we also affirm the trial court's denial of the motion to dismiss Plaintiffs' fourth cause of action for punitive damages, because if Plaintiffs are successful with their intentional infliction of emotional distress claim, they may also establish a right to punitive damages. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 656-57, 543 S.E.2d 901, 905-06 (2001) (affirming denial of summary judgment motion claim seeking relief from punitive damages cause of action brought by public official sued in his individual capacity who raised public official immunity as a defense).

Regarding Plaintiffs' second and third causes of action, for negligent infliction of emotional distress and negligence respectively, we must review the Trial Record to determine whether it supports a conclusion that Defendants (1) were not public officials (i.e., were mere public employees), (2) acted outside and beyond the scope of their official authority, or (3) acted with malice or corruption.

We address each element in turn.

a. Public Officials

[3] Although public officials may not be held individually liable for mere negligence in actions taken without malice or corruption and within the scope of their duties, public employees may be held individually liable for such actions. *Isenhour v. Hutto*, 350 N.C. 601, 608-10, 517 S.E.2d 121, 127 (1999) (quotation marks and citation omitted).

Our Supreme Court has "recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Id.* at 610, 517 S.E.2d at 127. Courts applying this framework have recently held that a defendant seeking to establish public official immunity must demonstrate that all three of the *Isenhour* factors are present. *Leonard v. Bell*, ___ N.C. App. ___,

___, 803 S.E.2d 445, 453 (2017) ("Because we hold that defendants' positions are not created by statute, we need not address the remaining elements to reach the conclusion that defendants are not public officials entitled to immunity.").

We have also noted that, in addition to the *Isenhour* factors, public officials also are often required to take an oath of office, while a public employee is not required to do so. *Fraley v. Griffin*, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011). But courts considering claims of public official immunity have made clear that, unlike the *Isenhour* factors, an oath of office is not "absolutely necessary[.]" *Baker v. Smith*, 224 N.C. App. 423, 431 n.5, 737 S.E.2d 144, 149 n.5 (2012).

1. Position Created by Constitution or Statute

"A position is considered created by statute when the officer's position ha[s] a clear statutory basis or the officer ha[s] been delegated a statutory duty by a person or organization created by statute or the Constitution." *Id.* at 428, 737 S.E.2d at 148 (internal quotation marks, citations, and emphasis omitted).

Defendants argue that their positions are "created by" N.C. Gen. Stat. § 157 (2017), but point to no language in our Constitution or any statute expressly creating their positions. Defendants also argue that they have been delegated statutory duties by RHA,[3] which is statutorily authorized to (1) "employ . . . such other officers, agents, and employees, permanent and temporary, as it may require" and (2) "delegate to one or more of its agents or employees such powers or duties as it may deem proper." N.C. Gen. Stat. § 157-5(e); *see also* N.C. Gen. Stat. § 157-9(a) (authorizing RHA to "exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, though or by an agent or agents which it may designate").

Our case law makes clear that where a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate passes the first the *Isenhour* factor. *Baker*, 224 N.C. App. at 428-30, 737 S.E.2d at 148-49 (holding that where the relevant statute (1) gave the constitutionally-created sheriff the duty to take "care and custody of the jail" and (2) provided the sheriff with authority to "appoint a deputy or employ others to assist him in performing his official duties[,]" an assistant jailer's "position [was]

3. Plaintiffs concede that RHA is an organization created by statute.

created by [the North Carolina] Constitution" (emphasis omitted)); *Hobbs v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 412, 421, 520 S.E.2d 595, 602 (1999) (holding that because the relevant statute gave the director of social services the authority "to delegate to one or more members of his staff the authority to act as his representative," social workers were acting as public officials for public official immunity purposes (citation omitted)). In their brief, Plaintiffs concede that N.C. Gen. Stat. § 157-5(e) "allows a housing authority to delegate its powers and duties to one or more of its agents," but argue that "it does not require that all employees . . . actually receive any delegated duties."

The Trial Record shows that many of Defendants' duties were created by N.C. Gen. Stat. § 157, and must therefore have been delegated them by RHA. For example, N.C. Gen. Stat. § 157-9 empowers the RHA to "prepare, carry out and operate housing projects"[4] and to "manage as agent of any city or municipality . . . any housing project constructed or owned by such city." N.C. Gen. Stat. § 157-9(a). Exhibit 3 to Defendants' memorandum in support of their motion to dismiss describes Lewis' duties as including, *inter alia*, "[p]lann[ing], direct[ing], and coordinat[ing] the work of [subordinates] in facilitating the orderly management and operations of all housing units" and "[d]evelop[ing] and implement[ing] management plans," and Exhibit 4 describes Ayodele's duties as including, *inter alia*, "managing one or more public housing and/or affordable market rate communities" and "overall management of [a public housing and/or affordable market rate community] including planning, budgeting, marketing, and fiscal management." Such job descriptions parrot the duties expressly granted to RHA to operate and manage housing projects, which Plaintiffs concede RHA was authorized to delegate by statute.

The significant overlap between RHA's delegable duties and Defendants' duties as described in Exhibits 3 and 4—which Plaintiffs did not contest with their own proffer of evidence, and which the uncontroverted allegations of Plaintiffs' complaint do not call into question—leads us to conclude that Defendants held positions created by statute.

2. Exercise of a Portion of the Sovereign Power

While the contours of what the sovereign power includes are not clearly defined by our case law, it is evident that a defendant claiming themself a public official for immunity purposes must show that they

4. "Housing project" is statutorily defined as including "all real and personal property" and "buildings" "constructed [*inter alia*] [t]o provide safe and sanitary dwelling accommodations" for persons of modest incomes. N.C. Gen. Stat. § 157-3(12).

have exercised a portion of some power that only the sovereign may exercise, as granted to the sovereign by either the Constitution or a statute. *Compare Baker*, 224 N.C. App. at 430, 737 S.E.2d at 149 (holding that an assistant jailer exercises a portion of the sovereign power "by detaining misdemeanants and those awaiting trial in the jail"), *with Mullis v. Sechrest*, 126 N.C. App. 91, 98, 484 S.E.2d 423, 427 (1997) (denying a public school teacher immunity "because his duties at the time the alleged negligence occurred are not considered in the eyes of the law to involve the exercise of the sovereign power"), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998); *see also Leonard*, ___ N.C. App. at ___, 803 S.E.2d at 453 (noting that "there is nothing uniquely sovereign about the health services provided by [the defendant, a physician,] to plaintiff in this case, except that plaintiff was an inmate" in a state prison).

Plaintiffs concede that the "sovereign powers associated with housing authorities are set forth in N.C. Gen. Stat. § 157-9." *See* N.C. Gen. Stat. § 157-9 (listing the "public powers" of housing authorities like RHA). As noted above, the Trial Record demonstrates significant overlap between the N.C. Gen. Stat. § 157-9 sovereign powers and the duties delegated to Defendants. Plaintiffs' argument that "there is little overlap between the powers listed and Defendants' duties" is actually a concession regarding the second *Isenhour* factor, since *any* overlap between RHA's public powers and the delegable duties performed by Defendants on RHA's behalf compels a conclusion that Defendants exercised "*a portion* of the sovereign power." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (1999) (emphasis added); *see also State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) ("the incumbent of an office shall involve the exercise of *some portion* of the sovereign power") (emphasis added)).

We accordingly conclude that Defendants exercised a portion of the sovereign power.

3. Discretion

Our Supreme Court has said that public officials "exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Meyer v. Walls*, 347 N.C. 97, 113, 489 S.E.2d 880, 889 (1997) (internal quotation marks and citations omitted). The decision making involved must be substantial, as "a mere employee doing a mechanical job, . . . must exercise some sort of judgment in plying his shovel or driving his truck -- but he is in no sense invested with

a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character." *Miller v. Jones*, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945).

The Trial Record shows that Defendants were tasked with, *inter alia*, "independently" (1) planning, directing, and coordinating the management of RHA housing units, (2) developing, implementing, and executing management plans, (3) formulating various policies and procedures, (4) evaluating overall program and employee performance, (5) recommending and preparing budgets, (6) inspecting properties for conformance with applicable regulations, (7) planning the work of and supervising staff, (8) analyzing rents, (9) counseling residents, and (10) resolving disputes involving residents, duties which led RHA to seek applicants with experience in "management" and "decision making."

Plaintiffs list certain of Defendants' duties that arguably require little judgment, and argue that Defendants "executed ministerial tasks[.]" But as Plaintiffs note, we cannot single out a handful of Defendants' duties in deciding whether they require discretion, but must consider Defendants' duties as a whole. *Baker*, 224 N.C. App. at 431, 737 S.E.2d. at 150. Moreover, Plaintiffs' argument conflicts with the fact that their complaint, distilled to its essence, alleges that Defendants harmed Plaintiffs by refusing or failing to exercise their discretionary authority to move Plaintiffs to another apartment: Plaintiffs allege therein that Defendants "refused," "ignored," or "denied" Plaintiffs' requests for accommodation. Such allegations speak the language of discretion. The Trial Record contains nothing tending to show that Defendants had any specific, fixed duty to transfer Plaintiffs such that Defendants' denials of Plaintiffs' requests constituted refusals or failures to execute already-made decisions, and any effort to hold Defendants liable for refusing or failing to make a decision that was not theirs to make clearly must fail.

We accordingly conclude that Defendants' positions were discretionary in nature, and that Defendants were public officials in the meaning of *Isenhour*.[5]

b. Scope of Authority

Even as public officials, sovereign immunity will not shield Defendants from suit for actions they took that fell outside and beyond the scope of their official authority.

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5. The Trial Record contains no clear indication of whether Defendants took an oath of office or not. But since this consideration is not dispositive to the *Isenhour* public-official analysis, *see Baker*, 224 N.C. App. at 431 n.5, 737 S.E.2d at 149 n.5, and we find the other *Isenhour* factors support our conclusion, we need not analyze this consideration.

But the Trial Record contains no evidence that Defendants exceeded their authority in this case. Plaintiffs' conclusory allegation that "[u]pon information and belief, [Defendants] also exceeded their authority" is insufficient as a matter of pleading to withstand Defendants' motion to dismiss. *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890 (noting that conclusory allegations are insufficient to withstand a motion to dismiss, and that "[t]he facts alleged in the complaint must support such a conclusion"). The complaint elsewhere alleges that Defendants were public housing managers at RHA, and as discussed above, the thrust of Plaintiffs' argument is that Defendants harmed Plaintiffs by refusing or failing to exercise the discretionary authority Defendants had, as RHA public housing managers, to move Plaintiffs to another apartment. Without a clear duty to exercise that authority, which the Trial Record does not reflect, the trial court lacked evidence to conclude that Defendants acted outside and beyond the scope of their authority by not moving Plaintiffs to another apartment. *See Clouse v. Gordon*, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994) ("the law is such that mere inaction does not constitute negligence in the absence of a duty to act" (internal quotation marks and citations omitted)).

We accordingly conclude that the Trial Record does not support a conclusion that Defendants acted outside and beyond the scope of their official authority.

c. Malice or Corruption

Finally, even as public officials acting within the scope of their official authority, sovereign immunity will not shield Defendants from suit for actions they took which were malicious or corrupt. Plaintiffs make no allegation that Defendants' actions or inactions were corrupt, and we accordingly analyze only whether the Trial Record contains evidence that Defendants' actions or inactions were malicious.

"A malicious act is one which is: (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Fullwood*, 250 N.C. App. at 38, 792 S.E.2d at 550 (internal quotation marks and citations omitted). This Court has said that public officials are presumed to have executed their duties in good faith, absent substantial evidence to the contrary:

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging

> the validity of public officials actions to overcome this presumption by competent and substantial evidence. Moreover, [e]vidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise.

Strickland v. Hedrick, 194 N.C. App. 1, 10-11, 669 S.E.2d 61, 68 (2008) (internal quotation marks and citations omitted).

Beyond a conclusory allegation that Defendants "acted with malice," which is insufficient standing alone to withstand Defendants' motion to dismiss, *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890, the complaint alleges only that Defendants (1) "acted with . . . reckless indifference to the [Plaintiffs'] rights" and (2) refused or failed to exercise their discretionary authority to transfer Plaintiffs to another apartment, which Plaintiffs allege was "intended . . . to cause [Plaintiffs] extreme emotional distress." This Court has made clear that a plaintiff may not satisfy its burden of pleading malice by alleging the defendant was recklessly indifferent. *Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) (citations omitted). And Plaintiffs' other conclusory allegations that Defendants' actions or inactions were intended to cause them harm are insufficient to overcome the presumption that public officials act in good faith. *See Mitchell v. Pruden*, 251 N.C. App. 554, 561-62, 796 S.E.2d 77, 83 (2017) (noting the plaintiffs' "bare, conclusory allegations that defendant acted with malice" in holding that, "[b]ecause we presume that defendant discharged his duties in good faith and exercised his power in accordance with the spirit and purpose of the law and plaintiffs have not shown any evidence to the contrary, we hold that the [] complaint failed to allege facts which would support a legal conclusion that defendant acted with malice").

In sum, we conclude that the Trial Record does not support a conclusion that Defendants acted with malice or corruption.

IV. Conclusion

Because we conclude that Defendants (1) were not mere public employees, (2) did not act outside and beyond the scope of their official authority, and (3) did not act with malice or corruption, we conclude that Defendants were shielded from Plaintiffs' causes of action sounding in negligence by the public official immunity doctrine, and the trial court erred in denying Defendants' Rule 12(b)(2) motion to dismiss Plaintiffs' second and third causes of action for lack of personal jurisdiction.

Defendants' appeal of the denial of their Rule 12(b)(1), 12(b)(6), and estoppel motions is dismissed, the denial of Defendants' Rule 12(b)(2) motion is affirmed as to Plaintiffs' first and fourth causes of action, and the denial of Defendants' Rule 12(b)(2) motion is reversed as to Plaintiffs' second and third causes of action. This case is remanded to the trial court for entry of an order dismissing Plaintiffs' second and third causes of action and for further proceedings consistent with this opinion.

DISMISSED IN PART, AFFIRMED IN PART, AND REVERSED IN PART.

Chief Judge McGEE and Judge DIETZ concur.

CHERYL CHRISTINE POAGE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT BATEMENT POAGE, PLAINTIFFS

v.

IRA COX; GAIL COX; AND SCHOENEN POOL AND SPA, LLC, DEFENDANTS

No. COA18-1066

Filed 7 May 2019

1. Pretrial Proceedings—motion for summary judgment—trial court decision—prior to end of discovery period—prejudice

Plaintiffs in a negligence action did not demonstrate they were prejudiced by the trial court's entry of summary judgment for defendants before the discovery period ended, because plaintiffs were not awaiting any responses to discovery requests, nor did they request additional discovery in order to defend against the summary judgment motions.

2. Appeal and Error—waiver—unsworn expert testimony—motion to strike denied—no cross-appeal or argument

Defendants' failure to cross-appeal from the denial of their motions to strike unsworn expert-prepared materials (which were submitted by plaintiffs in response to defendants' motions for summary judgment) or to argue on appeal that the trial court abused its discretion constituted a waiver of the argument that the materials should not be considered on appeal.

3. Negligence—duty of care—vacation rental—hot tub—fit and habitable condition

Owners of a vacation rental home, subject to the Vacation Rental Act, owed plaintiffs a duty of care to rent their property, including a hot tub located there, in a fit and habitable condition. Even assuming the owners could delegate any duty to a third-party company that serviced the property's hot tub (from which plaintiffs alleged they contracted Legionnaires' disease), contradictory evidence from the owners and the third-party company created a genuine issue of material fact precluding summary judgment.

4. Negligence—duty of care—breach—vacation rental—hot tub—inadequate maintenance

Sufficient evidence was presented to create a genuine issue of material fact that the owners of a vacation rental home breached their duty of care to renters to provide the property, including a hot tub located there (from which plaintiffs alleged they contracted Legionnaires' disease), in a fit and habitable condition. Expert analysis stated it was more likely than not that improper maintenance of the hot tub and adjacent waterfall feature created conditions in which bacteria could grow.

5. Negligence—proximate cause—vacation rental—hot tub—inadequate maintenance—Legionnaires' disease

Sufficient evidence was presented to create a genuine issue of material fact that improper maintenance of a hot tub and adjacent waterfall feature at a vacation rental home caused renters to contract Legionnaires' disease. Although samples of the water were negative for the bacteria that causes the disease, the tests were conducted over a month after plaintiffs rented the property and after the hot tub had been drained and cleaned.

6. Negligence—injury—vacation rental home—hot tub—Legionnaires' disease—pain and suffering—medical expenses

Sufficient evidence was presented to create a genuine issue of material fact regarding renters' injuries from contracting Legionnaires' disease from an improperly maintained hot tub at a vacation rental home, where they were diagnosed with the disease, hospitalized, incurred medical expenses, and experienced pain and suffering.

7. Appeal and Error—abandonment of issue—summary judgment—breach of contract

Plaintiffs failed to preserve for review any argument regarding their breach of contract claims by not addressing the issue on

appeal. Although the trial court's order granting summary judgment to defendants on plaintiffs' negligence claim did not specifically mention the breach of contract claim, plaintiffs' failure to make any argument other than to assert that the claim was not ripe for review constituted abandonment.

Appeal by plaintiffs from order entered 12 June 2018 by Judge Michael L. Robinson in Forsyth County Superior Court. Heard in the Court of Appeals 5 March 2019.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., Kip David Nelson, and Jules Zacher, pro hac vice, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, for defendant-appellees Cox.

Robert B. Laws for defendant-appellee Schoenen Pool and Spa, LLC.

TYSON, Judge.

Cheryl Christine Poage appeals the trial court's order granting summary judgment to Ira and Gail Cox ("the Coxes") and Schoenen Pool and Spa, LLC, ("Schoenen"). We affirm in part, reverse in part, and remand.

I. Background

The Coxes owned a mountain cabin ("the Cabin") they rented to vacationers. In July 2009, they installed a hot tub and an adjacent waterfall on their property. The Coxes had hired Schoenen to maintain, clean, and perform routine service on the hot tub and waterfall.

Cheryl Poage reserved the Cabin on the Airbnb.com website. Cheryl Poage; her husband, Robert Poage; and Robert's two adult sons, Eric and Jason Poage; stayed at the Cabin from 24 August to 27 August 2015. During their visit, Cheryl and Robert Poage spent time in and around the hot tub and waterfall. On 29 August 2015, shortly after their visit to the Cabin, Cheryl Poage began experiencing weakness and fever. Robert Poage began experiencing fever, weakness, chills, and headache. Cheryl and Robert Poage ("the Poages") were allegedly diagnosed with *Legionella* pneumonia, more commonly known as Legionnaires' disease, and both allegedly required hospitalization.

On 10 August 2016, the Poages filed a complaint alleging they had contracted Legionnaires' disease after coming into contact with

Legionella bacteria in the Coxes hot tub and waterfall. The Poages asserted claims for negligence against the Coxes and Schoenen (collectively "Defendants"), and breach of contract against the Coxes. The Poages alleged, among other things:

> 15. Defendants Cox owed a duty to their rental customers, including plaintiffs, to exercise reasonable care in the operation and maintenance of the rental unit and to keep the facility in a reasonably safe condition.
>
> 16. Defendants Cox further owed a duty to their rental customers, including plaintiffs, to warn of hidden perils or unsafe conditions known by defendants or discoverable by reasonable inspection.
>
> . . .
>
> 24. It was the duty of Defendant Schoenen [to properly] maintain the said water feature in a reasonably safe manner so as not to subject guests and visitors to the premises, including plaintiffs, to unreasonable risks of harm.
>
> . . .
>
> 27. Plaintiffs contracted with Defendants Cox for the rental of defendants' property for occupancy by plaintiffs.
>
> 28. An implied term of the rental contract was that the rental property would be suitable and safe for normal occupancy, and that plaintiffs would have the quiet enjoyment of same.
>
> 29. Defendants Cox breached the contract by providing plaintiffs with a facility that included an unreasonably dangerous peril, namely the contaminated water feature described herein.
>
> 30. As a proximate result of said defendants' breach of their contract with plaintiffs, plaintiffs suffered the injuries and losses set forth above.

Robert Poage died on 16 December 2016, purportedly for reasons unrelated to Legionnaires' disease, and Plaintiff moved to substitute herself for him as executrix of his estate in the lawsuit. On 14 December 2017, the trial court entered a scheduling and discovery consent order, which required the completion of all discovery by 13 July 2018. The Coxes and Schoenen filed motions for summary judgment pursuant to

North Carolina Rule of Civil Procedure 56 in April 2018. The parties subsequently submitted briefs, exhibits and deposition transcripts.

A hearing was conducted on Defendants' motions on 11 June 2018 and the trial court issued an order granting Defendants' summary judgment.

The trial court's summary judgment order stated, in relevant part:

> 2. During the hearing on June 11, 2018, counsel for both Defendants made oral motions to strike the statements or affidavits of Carl Fliermans and Jonathan Kornreich. Defendants contend that the statements were not timely served, did not contain necessary attestations, were not sworn to, or were otherwise procedurally improper and inadmissible and are thus not properly considered as evidence with regard to the Motions. The Court in its discretion denies these motions to strike to the extent they are based on claimed procedural irregularities and determines that, for purposes of its consideration of the Motions, it will consider the statements made by Dr. Fliermans and Mr. Kornreich. Whether the testimony or statements within the documents are admissible and properly considered by the Court, or sufficient in and of themselves, when combined with other evidence brought forward by Plaintiffs, to permit Plaintiffs to avoid summary judgment, is an entirely different and is matter dealt with hereinbelow.
>
> 3. Notwithstanding the Court's denial of the oral motions to strike, and based on the Court's review of the Motions, its review of the Court file, including the statements brought forward by Plaintiffs, and its consideration of the arguments of counsel for the parties, the Court concludes that Defendants' motions for summary judgment should be granted and Plaintiffs' claims dismissed.
>
> . . .
>
> 5. It is undisputed as a factual matter that the water in the water treatment never tested positive for the presence of legionella bacteria, though the parties disagree as to the cause of this fact.
>
> . . .

8. The parties all agree that legionella bacteria is ubiquitous – it exists throughout nature in greater or lesser degrees. Notwithstanding this fact, Plaintiffs have come forward with no objective evidence that the water feature was contaminated with legionella bacteria at the time Plaintiffs stayed at the Coxes' home.

9. Following several years of discovery pursuant to a discovery scheduling order entered in the case, but before the deadline for Defendants to designate their expert witnesses. Defendants filed the Motions, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, seeking entry of summary judgment in their favor and dismissing Plaintiffs' action for a host of reasons. Defendants contend that Plaintiffs have failed to come forward with sufficient admissible evidence to prove either that Defendants breached a legal duty to Plaintiffs or (in the case of the Coxes) breached a contract between the Coxes and Plaintiffs. Defendants further contend that Plaintiffs have failed to come forward with sufficient admissible evidence to prove that, even assuming a breach of a duty or contract, that the alleged breach proximately resulted in Plaintiffs' illness. Defendants also contends [*sic*] that Plaintiffs assumed the risk of illness and were contributorily negligent by virtue of the fact that they were aware of irregularities in the water and they were warned not to use the spa until further notice but used it nonetheless.

. . .

13. Having carefully considered the record in this matter, and having also considered the arguments of counsel for the parties, the Court concludes that Defendants have made a sufficient initial showing to shift the burden to Plaintiffs to come forward with evidence to substantiate their claims. Further, while there may be in the Court's opinion sufficient evidence of negligence or breach of contract on Defendants' part, Plaintiffs have nonetheless failed to come forward with sufficient admissible evidence to support one or more of their required factual showings to proceed to trial: (a) that the water feature was contaminated with legionella bacteria at the time Plaintiffs stayed at the Coxes' house; or (b) that Plaintiffs contracted legionella pneumonia from being in the vicinity of the water feature.

14. With regard to both factual issues, Plaintiffs have relied on speculation and conjecture, as opposed to coming forward with admissible evidence to support their contentions in two critical regards, Michael L. Silverman's statement, dated June 6, 2018, states that:

> Based upon my training, experience and expertise and based upon my review of the records listed above, it is my medical opinion more likely than not that Mr. and Mrs. Poage developed Legionella pneumonia as a result of exposure to the hot tub and waterfall while staying at this rental property from August 24 to August 27, 2015 (Silverman Aff. ¶ 8.)

15. Putting aside the "more likely that not" standard utilized by Dr. Silverman, rather than "to a reasonable degree of medical certainty", the basis for this opinion is set forth in an earlier paragraph as follows:

> The simple fact that both Mr. and Mrs. Poage developed Legionella pneumonia at the same time in early September 2015, supports the Airbnb home they stayed as the source as [sic] the incubation of two to ten days is consistent with this fact. (Silverman Aff., ¶4, p. 5)

16. Dr. Silverman's statement is the only one put forward by Plaintiffs that purports to provide the vital and necessary proximate cause link between Defendants' alleged negligence and Plaintiffs' claims for illness and injuries. The Court believes that Dr. Silverman's statement does not provide a proper basis for an opinion satisfying the proof element of proximate causation. The above quoted language stands for nothing more than that the timeline in this case is "consistent with" the Poages having contracted legionella bacteria while at the Coxes' home. The Court concludes that such a statement does not satisfy Plaintiffs' obligation to come forward with admissible evidence of proximate causation.

17. Similarly, the "statement" by Jonathan Kornreich, another witness proferred by Plaintiffs as a purported

expert opinion witness, provides, in relevant part (at least as to the proximate cuase [*sic*] issue), that:

> In this instance, it is clearly more likely than not that the chain of failures and disregard of standard safety practices, both by Schoenen and Cox, observed at this property created a situation in which dangerous bacteria were permitted to propogate [*sic*] and infect an innocent member of the public. (Kornreich statement, p. 4)

18. While it is not at all clear to the Court, to the extent that "an innocent member of the public" is intended by Mr. Kornreich to refer to Mr. and/or Mrs. Poage, Mr[.] Kornreich's statement provides no information from which the Court can conclude that his opinion, at least as it relates to the issue of proximate causation, would be admissible before a jury. In fact, based on Mr. Kornreich's resume attached to his statement, the Court can amply conclude that he is not competent to render an opinion in this case with regard to medical causation.

19. In other words, having no objective evidence that legionella bacteria was present in the Coxes' water feature, or that the water in the water feature was the source of Plaintiffs' illness, as opposed to any number of other possible alternative sources, legionella bacteria being admitted by Plaintiffs to be ubiquitous, Plaintiffs extrapolate from (a) the fact that the Poages were allegedly later diagnosed with legionella pneumonia; into a factually unsupported conclusion that (b) the water feature must have been contaminated with legionella bacteria and must have been the source of Plaintiffs' illness. The Court does not believe the law of North Carolina permits such a "leap of faith". Plaintiffs' factual assertions are tantamount to the application of the doctrine of *res ipsa loquitur* which has, to the Court's knowledge, never been applied to a factual situation such as this. [footnote omitted].

20. Therefore, based on the record before the Court, the Court concludes that Plaintiffs have failed to come forward with sufficient admissible evidence to substantiate a claim that Plaintiffs were injured as a proximate

> result of Defendants' wrongful conduct. As a result of this fundamental evidentiary failure of proof, the Court concludes that Motions should be and are hereby granted and Summary Judgment is hereby entered in Defendants' favor and against Plaintiffs.

Cheryl Poage, individually and as executrix of the estate of Robert Poage ("Plaintiffs"), filed timely notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Standard of Review

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (Tyson, J.) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "Evidence presented by the parties is viewed in the light most favorable to the nonmovant." *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

Rule of Civil Procedure 56(e) provides in relevant part: "Supporting and opposing affidavits [submitted in connection with summary

judgment] shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2017) (emphasis supplied).

" 'Ordinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge.' " *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000) (brackets omitted) (quoting *State v. Underwood*, 134 N.C. App. 533, 541, 518 S.E.2d 231, 238 (1999)). "The determination of the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of discretion." *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991). "[T]o survive defendants' motion for summary judgment . . . plaintiff must allege a *prima facie* case of negligence—defendants owed plaintiff a duty of care, defendants' conduct breached that duty, the breach was the actual and proximate cause of plaintiff's injury, and damages resulted from the injury." *Lamm v. Bissette Realty*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990) (citation omitted).

"Summary judgment is seldom appropriate in a negligence action." *Hamby v. Thurman Timber Co., LLC*, __ N.C. App. __, __, 818 S.E.2d 318, 323 (2018) (citation omitted). "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

IV. Discovery Period

[1] Plaintiffs argue the trial court prejudicially erred by considering and granting Defendants' motions for summary judgment before the discovery period had ended. We disagree.

> Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so. However, [a] trial court is not barred in every case from granting summary judgment before discovery is completed.

Patrick v. Wake Cty. Dep't of Human Servs., 188 N.C. App. 592, 597, 655 S.E.2d 920, 924 (2008) (citations and quotation marks omitted) (alteration in original). "A trial court's granting summary judgment before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced." *Hamby v. Profile Prod., LLC*, 197 N.C. App. 99, 113, 676 S.E.2d 594, 603 (2009) (citations omitted).

Plaintiffs were not awaiting any responses to interrogatories or the production of any further evidence at the time the trial court heard the motions. Plaintiffs had not requested any additional depositions. Plaintiffs never argued before the trial court that additional discovery was needed to challenge or delay ruling upon Defendants' summary judgment motions.

Plaintiffs have failed to demonstrate they were prejudiced by the trial court considering and ruling upon Defendants' summary judgment motions before the discovery period had ended. *See id.* Plaintiffs' argument is without merit and overruled.

V. Plaintiffs' Experts

[2] Plaintiffs submitted expert-prepared materials in response to Defendants' motions for summary judgment. One was the affidavit of Dr. Carl Fliermans, Ph.D, and another was a report authored by Jonathan Kornreich. Defendants argue Dr. Fliermans's affidavit and Kornreich's report should not be considered in determining whether summary judgment is proper because they do not constitute sworn testimony.

Defendants made oral motions to strike Dr. Fliermans's affidavit and Kornreich's report at the trial court's hearing on their motions for summary judgment in part, on the basis these expert materials were not sworn testimony. The trial court's order granting summary judgment to Defendants states, in relevant part: "The Court in its discretion denies these motions to strike to the extent they are based on claimed procedural irregularities[.]" Defendants assert this Court should not consider Dr. Fliermans's affidavit and Kornreich's report because of procedural irregularities, but do not reference or cross-appeal the trial court's denial of their motions to strike.

"We review the trial court's ruling on [a] motion to strike [an] affidavit for abuse of discretion." *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002). Defendants do not argue the trial court abused its discretion or otherwise erred by denying their motions to strike. Based upon Defendants' failure to cross-appeal from or argue the trial court abused its discretion by denying their motions to strike, we find their purported arguments that this Court should not consider Dr. Fliermans's affidavit or Kornreich's report are waived and subject to dismissal. *See High Rock Lake Partners, LLC v. N. Carolina Dep't of Transp.*, 234 N.C. App. 336, 341, 760 S.E.2d 750, 754 (2014) (finding the appellants argument that the trial court erred by denying their motion for attorney's fees was waived when appellants failed to argue the trial court abused its discretion).

VI. Negligence

Plaintiffs next argues genuine issues of material fact on their negligence claim precludes summary judgment.

"To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Petty v. Cranston Print Works*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956) (citation omitted). Our Supreme Court has held that negligence is the "failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992) (citation omitted).

A. *Duty*

[3] With regards to the Coxes, Plaintiffs have forecasted evidence to establish a genuine issue of material fact with respect to the element of duty of care.

Our Supreme Court has held that landowners owe a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). "Whether a landowner's care is reasonable is judged against the conduct of a reasonably prudent person under the circumstances." *Kelly v. Regency Ctrs. Corp.*, 203 N.C. App. 339, 343, 691 S.E.2d 92, 95 (2010). The Coxes' counsel conceded at the summary judgment hearing before the trial court that the Coxes, and their cabin, were subject to the Vacation Rental Act, N.C. Gen. Stat. §§ 42A-1 to 42A-40. Pursuant to the Vacation Rental Act, "A landlord of a residential property used for a vacation rental shall[,]" among other things:

> (2) Make all repairs and do whatever is reasonably necessary to *put and keep the property in a fit and habitable condition.*
>
> (3) Keep all common areas of the property in safe condition.
>
> (4) Maintain in good and safe working order and reasonably and promptly repair all electrical, plumbing, sanitary, heating, ventilating, and other facilities and major

> appliances supplied by him or her upon written notification from the tenant that repairs are needed.

N.C. Gen. Stat. § 42A-31 (2017) (emphasis supplied).

The Vacation Rental Act further provides that "[t]hese duties shall not be waived[.]" *Id.* Plaintiffs' forecast of evidence could support a conclusion that the Coxes leased their cabin as a vacation rental to the Poages; that the hot tub and waterfall were not safe for tenant occupancy; and that the Coxes breached their statutory duty to "do whatever is reasonably necessary to put and keep the property in a fit and habitable condition." *Id.*

"A violation of the duty to maintain the premises in a fit and habitable condition is evidence of negligence." *Brooks v. Francis*, 57 N.C. App. 556, 559, 291 S.E.2d 889, 891 (1982).

With regard to Schoenen owing the Poages a duty of care:

> Privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party. *There is a duty to protect third parties where a reasonable person would recognize that if he does not use ordinary care and skill in his own conduct, he will cause damages or injury to the person or property of the other.*

Westover Products, Inc. v. Gateway Roofing, Inc., 94 N.C. App. 63, 67, 380 S.E.2d 369, 372 (1989) (emphasis supplied).

Here, it is undisputed the Poages were invitees and renters of the Coxes who stayed at the cabin from the 25 to 27 August 2015.

The Coxes argue they delegated any duty they may have owed the Poages to Schoenen, by hiring them "as the experts to maintain" the hot tub and waterfall.

Amy Schoenen Avery ("Avery"), the owner of Schoenen, answered in her response to Plaintiffs' interrogatories that "she was never advised the Cox property was leased to tenants." Avery testified in her deposition that if she had known the cabin was being rented, Schoenen would have utilized the maintenance procedures that are suitable for a commercial hot tub. Gail Cox testified that from when she initially hired Schoenen to service the hot tub and waterfall, she let Avery know that they were renting the cabin.

Presuming *arguendo*, the Coxes could delegate their common law duty of reasonable care and their statutory duties under the Vacation Rental Act to Schoenen, genuine issues of material fact exist regarding whether the Coxes delegated their duties to Schoenen. The difference between Gail Cox and Avery's testimony with regards to whether Avery knew the Cabin was being rented to third-parties creates a genuine issue of material fact, which precludes summary judgment on this issue.

B. *Breach*

[4] Plaintiffs argue sufficient evidence creates a question of material fact of whether Defendants breached their duty of care. We agree.

The Division of Public Health of the North Carolina Department of Health and Human Services ("DHHS") conducted an investigation of the Coxes' Cabin, including the hot tub and waterfall, following notification that the Poages were hospitalized for Legionnaires' disease.

Following this investigation by DHHS, Drs. Jessica Rinsky and Zachary Moore prepared a final report dated 24 November 2015 ("the Rinsky Report").

The Rinsky Report stated, in relevant part:

> Division of Public Health and Burke County Environmental Health staff identified hot tub and waterfall maintenance practices that may have provided conditions conducive for *Legionella* growth, including a lack of continual disinfection of the spa; periods where the waterfall system did not continuously flow; water stagnation between rentals; and, a lack of continual disinfection of the waterfall system.
>
> . . . .
>
> [E]nvironmental health staff noted hot tub and waterfall maintenance practices that did not meet recommendations for *Legionella* control.

In addition to the Rinsky Report, Plaintiffs submitted the report of Jonathan Kornreich ("Kornreich Report"). Jonathan Kornreich previously owned a pool construction and maintenance company. Kornreich's report compared the maintenance practices performed at the Cabin to recommended industry standards and best practices. Kornreich's report states, in relevant part:

a. Equipment: The [hot tub] relied on an alternative sanitization device [Nature2 Sticks] which is not meant to be a primary and sole system. There was no provision made to create a sanitizer residual. This could have been accomplished easily and with very little cost through use of a chlorine or bromine floater, although the owner noted that renters were found to have removed the floater. In that case an inline feeder should have been installed. Had an inline feeder been installed, a sanitizer residual could have been automatically maintained. *A lack of residual sanitizer combined with warm spa water created conditions which were ideal for the propagation of bacteria, including legionella.*

b. Maintenance: Maintenance was provided by a professional swimming pool service company. According to their records, the chemical parameters were out of range on numerous occasions between June 2 and September 1, the dates for which we have records. Of the 14 service calls documented during that time, at no time were the water parameters within the "ideal range" as determined by the ANSI standard or within the range identified by the Nature2 manufacturer as correct operating parameters for their product. In one instance (July 8), the pH was at the maximum limit and the alkalinity was near the minimum limit. On that day a calculation of the Lanelier Saturation Index (as required when water is outside the ideal range) would have almost certainly found the water to be out of balance, although a failure to keep accurate records makes a retrospective calculation impossible.

When water chemistry parameters are outside the ideal range, the efficacy of sanitizers is diminished and pathogens are able to live and reproduce unhindered. Because of the lack of residual sanitizer, bacteria such as *Legionella* can become established in the water and create a biofilm. Biofilm bacteria may take a disinfectant level 100 times higher in concentration as well as vigorous scrubbing to remove.

. . .

Further, there is no record of the waterfall having been drained, cleaned, sanitized or scrubbed. *It is again more*

> *likely than not that a colony of Legionella would have been able to propagate in the waterfall* and infected anyone nearby through aerosolized droplets containing the bacteria.
>
> . . .
>
> *In this instance, it is clearly more likely than not that the chain of failures and disregard of standard safety practices, both by Schoenen and Cox, observed at this property created a situation in which dangerous bacteria were permitted to propagate*[.] [Emphasis supplied].

In addition to Kornreich's report, Plaintiffs also submitted the affidavit of their expert witness, Dr. Carl Fliermans, who possesses a Ph.D. in microbiology and has conducted ecological research on *Legionella* bacteria since 1977. Dr. Fliermans stated in his affidavit, in relevant part, that it was "more likely than not":

> The maintenance of this hot tub and water feature were not conducted in a proper way to prevent the growth, dissemination and infectivity of the *Legionella* bacterium to susceptible individuals2 [*sic*].
>
> . . .
>
> During the month of August, maintenance was performed on the spa and water feature on a weekly basis. Generally, two (2) ounces of granular chlorine were scattered into the spa pool area which contained 900 gallons of water. Such an addition is inadequate to affect the *Legionella* bacterium. *Legionella* is associated with biofilms in nature and those biofilms protect the bacterium from the action of the biocide. Doses of biocide need to exceed 10-30 ppm for shock chlorination to be effective.
>
> . . .
>
> The lack of a chlorine residual as specified by CDC, is to be between 2-4 ppm for a maintenance level of chlorine to provide a safe operation of a hot tub. *This level was never achieved in this facility with 2 ounces of chlorine granules. The absence of chlorine in a hot tub makes the hot tub with its warm waters and organic loading, a breeding ground for Legionella.* [Emphasis supplied]

With regard to the waterfall, Avery testified that there were periods where the waterfall system was not continuously circulating. According to Avery, the waterfall would occasionally run out of water from evaporation and remain stagnant for extended periods of time. Avery further testified "[M]y industry doesn't have standards for waterfalls. They're ornamental. They're not for swimming or bathing. *I didn't test the water in the waterfall*." (emphasis supplied). Avery agreed with the Rinsky Report's results that stagnant water in the waterfall may have been conducive to the growth of *Legionella* bacteria.

Viewed in the light most favorable to Plaintiffs, Plaintiffs have presented sufficient evidence showing genuine issues of material fact exist with regard to Defendants breaching their duty of care.

C. *Proximate Cause*

[5] Plaintiffs argue they have presented sufficient evidence to create a genuine issue of material fact of whether Defendants' negligence proximately caused them to contract Legionnaires' disease to overcome Defendants' motions for summary judgment. We agree.

"[T]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 431-32, 677 S.E.2d 485, 504 (2009) (citation omitted).

> [I]t is *only in exceptional cases*, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. *[P]roximate cause is ordinarily a question of fact for the jury*, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.

Williams v. Carolina Power & Light Co., 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (emphasis supplied) (citation and quotation marks omitted).

Defendants argue Plaintiffs are unable to establish any genuine issue of material fact to show causation, because tests of the hot tub and waterfall were negative for *Legionella* bacteria. Contrary to Defendants' arguments, it is well-settled that a plaintiff need not establish direct evidence of proximate causation. "Direct evidence of negligence is not required; it may be inferred from the attendant facts and circumstances." *Greene v. Nichols*, 274 N.C. 18, 22, 161 S.E.2d 521, 524 (1968).

"Actual causation may be proved by circumstantial evidence[.]" *Collins v. Caldwell Furniture Co.*, 16 N.C. App. 690, 694, 193 S.E.2d 284, 286 (1972) (citation omitted).

Ten samples were collected from the hot tub and waterfall on 30 September 2015 by the Burke County Health Department staff, over a month after the Poages visited the Cabin. These ten samples returned negative test results for *Legionella* bacteria. Following Plaintiffs' stay at the cabin, but before the Coxes were notified of Plaintiffs' diagnoses with Legionnaires' disease, Schoenen drained and cleaned the hot tub. Dr. Rinsky of DHHS testified in her deposition that Schoenen's draining and cleaning on 1 September 2015, irrespective of any chemical sanitation of the hot tub, would have affected the ability of a test to return positive results for *Legionella*.

After DHHS and the Burke County Health Department were notified of Plaintiffs' contracting Legionnaires' disease, Stacie Rhea of DHHS instructed the Coxes on 23 September 2015 to drain and disinfect the hot tub and waterfall and hyperchlorinate the hot tub. This sanitization of the hot tub and waterfall was conducted by Schoenen on an undetermined date before test samples were taken by the Burke County Health Department on 30 September 2015.

Dr. Zackary Moore, a medical doctor employed by DHHS, stated in his deposition that "The [Poages] were interviewed to look -- to inquire about other sources of air exposure or water exposure, and none were identified aside from the hot tub and waterfall at the rental house." He further stated that he "inquired about other sources of aerosolized water beyond the rental house, but none were identified so no other sources were considered further." "[T]he onset of illness in both cases meant that their time at the rental home would have been during . . . the likely exposure period."

Plaintiff's expert Dr. Fliermans testified in his affidavit, in relevant part:

> Schoenen Pool & Spa, LLC serviced the facility in question and has been shown by [the] John Kornreich Affidavit[] not to adequately treat the hot tub and water feature to prevent the *Legionella* bacterium from growing.
>
> . . .
>
> On August 25, the Schoenen Pool & Spa, LLC company according to the sparse records treated the hot tub with 4 ounces, of granular chlorine. No chlorine measurements

> were made in the field and none were recorded in the maintenance records. If this had been a shock chlorine treatment, then the Poage party would not have been able to enter the hot tub because of safety considerations. Thus, it was not a shock chlorination treatment that requires chlorine levels in excess of 20 ppm for an extended period of time. It is my opinion that the addition of 4 ounces of granular chlorines was effective in disturbing the biofilm in which the *Legionella* resided and may have exacerbated conditions to which the Poage's party were exposed. *If appropriate water samples had been taken and appropriately tested at that time, it is my opinion Legionella would have been detected to be present in the samples.*
>
> . . .
>
> Based upon my training and research on the ecology of *Legionella* it is my professional opinion that more likely than not the opinions rendered above are true and correct.

A genuine issue of material fact exists as to whether *Legionella* bacteria was present in the Coxes' hot tub or waterfall, and whether bacteria from the hot tub or waterfall caused Plaintiffs to contract Legionnaires' disease. This is based, in part, upon: (1) Dr. Fliermans's opinion *Legionella* bacteria would have been detected in the hot tub when Plaintiffs used it; (2) the proximity in time to Plaintiffs' use of the hot tub and their diagnoses with Legionnaires' disease; (3) both Plaintiffs contracting Legionnaires' disease within the exposure period; and (4) the expert opinions of Dr. Fliermans and Kornreich that the maintenance standards utilized by Schoenen were inadequate to have kept *Legionella* from contaminating the hot tub and waterfall. *See Williams*, 296 N.C. at 403, 250 S.E.2d at 258.

D. *Injury*

[6] Plaintiffs argue they have presented sufficient evidence to establish genuine issues of material fact with regard to the Poages' injuries. We agree.

Schoenen argues that Plaintiffs have failed to produce evidence to show Cheryl Poage was diagnosed with Legionnaires' disease. Neither Defendant challenges on appeal that Robert Poage was diagnosed with Legionnaires' disease.

Viewing the evidence in the light most favorable to Plaintiffs, sufficient evidence forecasts that Cheryl Poage was diagnosed with

Legionnaires' disease. Both Dr. Zachary Moore, and Dr. Michael Silverman, an infectious disease expert, testified that Cheryl Poage was diagnosed with Legionnaires' disease by means of a urine antigen test ordered by Novant Health Forsyth Medical Center, where she was hospitalized.

Plaintiffs met their burden to produce evidence showing a genuine issue of material fact exists with regard to the element of injury. Viewed in the light most favorable to Plaintiffs, their evidence tends to show the Poages were hospitalized for Legionnaires' disease, they incurred medical expenses, and they experienced pain and suffering as a result of the disease.

Plaintiffs' evidence establishes a genuine issue of material fact exists with respect to the Poages' injuries resulting from Legionnaires' disease.

VII. Breach of Contract

[7] In addition to negligence, Plaintiffs asserted a claim for breach of contract against the Coxes. The motion for summary judgment the Coxes filed with the trial court challenged all of Plaintiffs' claims, including breach of contract. The trial court's summary judgment order does not specifically address Plaintiffs' breach of contract claim, but the trial court granted summary judgment to Defendants on all of Plaintiffs' claims.

Plaintiffs do not specifically address their breach of contract claim in their appellate brief. The Coxes argue in their appellee brief that Plaintiffs have failed to forecast sufficient evidence of breach of contract. In their reply brief, Plaintiffs do not present an argument with respect to breach of contract, but assert the issue is "not ripe and should be remanded to the trial court for consideration in the first instance."

Although the trial court's summary judgment order does not specifically mention the breach of contract claim, the Coxes' motion for summary judgment requested summary judgment on all of Plaintiffs' claims, and the Coxes argued before the trial court that summary judgment on the breach of contract claim should be granted. The trial court's summary judgment order granted summary judgment to Defendants on all of Plaintiffs' claims. Based upon this Court's *de novo* standard of review of orders granting summary judgment, Plaintiffs' contention that the Coxes' arguments concerning breach of contract are not ripe is without merit. *See In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

Plaintiffs have failed to preserve or argue why the trial court's summary judgment order should be reversed with respect to their breach of contract claim. "Issues not presented in a party's brief, or in support

of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Plaintiffs have abandoned any arguments they may have asserted with respect to their breach of contract claim. *See id.* The trial court's summary judgment order is affirmed to the extent the trial court granted summary judgment to the Coxes on Plaintiffs' breach of contract claim.

VIII. Conclusion

Viewed in the light most favorable to Plaintiffs, Plaintiffs' forecast of evidence establishes genuine issues of material fact exist on all elements of their negligence claims against Defendants. Plaintiffs abandoned any argument that the trial court's order should be reversed to the extent the trial court granted summary judgment to the Coxes on Plaintiffs' breach of contract claim. The trial court's summary judgment order is affirmed with respect to Plaintiffs' breach of contract claim, reversed with respect to Plaintiffs' negligence claims against both Defendants, and is remanded for trial on Plaintiffs' negligence claims. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges DIETZ and BERGER concur.

RALEIGH RADIOLOGY LLC D/B/A RALEIGH RADIOLOGY CARY, PETITIONER,
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT, AND DUKE UNIVERSITY HEALTH SYSTEM, RESPONDENT-INTERVENOR

No. COA18-785

Filed 7 May 2019

Administrative Law—certificate of need—agency decision—appeal to administrative law judge—substitution of judgment

An administrative law judge (ALJ) improperly substituted his own judgment for that of the state agency (N.C. Department of Health and Human Services) in deciding which of two applicants would be granted a certificate of need for an MRI machine. Although the state agency had discretion to choose which factors it would consider in comparing applications, the ALJ deviated from the agency's analysis by considering additional factors.

Judge ARROWOOD concurring in result only.

Appeal by Respondents and cross-appeal by Petitioner from an amended final decision entered 16 March 2018 by Judge J. Randolph Ward in the Office of Administrative Hearings. Heard in the Court of Appeals 13 March 2019.

Brooks, Pierce, McLendon Humphrey & Leonard, L.L.P., by James C. Adams II, for Petitioner Raleigh Radiology LLC.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need.

Poyner Spruill LLP, by Kenneth L. Burgess, William R. Shenton, and Matthew A. Fisher, for Respondent-Intervenor Duke University Health System.

DILLON, Judge.

Petitioner Raleigh Radiology LLC ("RRAD") and Respondents N.C. Department of Health and Human Services, Division of Health Care Regulation, Healthcare Planning and Certificate of Need (the "Agency"), and Duke University Health System ("Duke") all appeal an amended final decision of the Office of Administrative Hearings regarding a Certificate of Need ("CON") for an MRI machine.

I. Background

In early 2016, the State Medical Facilities Plan determined a need for one fixed MRI machine in Wake County and began fielding competitive requests from various applicants. Duke and RRAD each filed an application for a CON with the Agency in April 2016.

In September 2016, the Agency conditionally approved Duke for the CON and denied RRAD's application.

In October 2016, RRAD filed a Petition for Contested Case Hearing. Duke was permitted to intervene in the contested case.

In November 2014, a contested case hearing was held before an administrative law judge (the "ALJ").

On 16 March 2018, the ALJ issued its Final Decision, reversing the decision of the Agency and ordering that "[t]he Certificate of Need shall be awarded to [RRAD]."

Duke and the Agency timely appealed. RRAD also timely cross-appealed.

II. Standard of Review

We review a final decision from an ALJ for whether "substantial rights of the petitioners may have been prejudiced[.]" N.C. Gen. Stat. § 150B-51(b) (2018). We use a *de novo* standard if the petitioner appeals the final decision on grounds that it violates the constitution, exceeds statutory authority, was made upon unlawful procedure, or was affected by another error of law. N.C. Gen. Stat. § 150B-51(b)(1)-(4), (c) (2018). And we use the whole record test if the petitioner alleges that the final decision is unsupported by the evidence or is "[a]rbitrary, capricious, or an abuse of discretion." N.C. Gen. Stat. § 150B-51(b)(5)(6), (c) (2018).

III. Analysis

Duke and the Agency argue that the ALJ erred in conducting its own "comparative analysis review" of the two CON applications. We review this question of law *de novo*. *Cumberland Cty. Hosp. Sys. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 527, 776 S.E.2d 329, 332 (2015).

Section 131E-183 of our General Statutes sets forth the procedure the Agency should use when reviewing applications for a CON. N.C. Gen. Stat. § 131E-183 (2016). Specifically, the Agency uses a two stage process.

First, the "the Agency must review each application independently against the criteria [set by its regulations] (without considering the competing applications) and determine whether it 'is either consistent with or not in conflict with these criteria.' " *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460 (1995) (citing N.C. Gen. Stat. § 131E-183(a)). Each "applicant for the issuance of a CON has the burden of demonstrating compliance with the review criteria[.]" *E. Carolina Internal Med., P.A. v. N.C. Dep't of Health & Human Servs.*, 211 N.C. App. 397, 404, 710 S.E.2d 245, 251 (2011).

Second, where there are competing applications which have passed the first step, "the Agency must decide which of the competing [conforming] applications should be approved" based on various "comparative" factors. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 461. "There is no

statute or rule which requires the Agency to utilize certain comparative factors." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006). But, rather, the Agency has discretion to choose which factors by which it will compare competing applications. *Id.*

Where an unsuccessful applicant appeals the Agency decision in a CON case, the ALJ in a contested case does *not* engage in a *de novo* review, but simply reviews for correctness of the Agency decision, pursuant to N.C. Gen. Stat. § 150B-23(a). *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252. In fact, "there is a presumption that 'an administrative agency has properly performed its official duties.' " *Id.* at 411, 710 S.E.2d at 255 (quoting *In re Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

In the present case, the Agency reviewed each application for the CON independently. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 460 (citing N.C. Gen. Stat. § 131E-183(a)). Such review revealed that Duke's application conformed with all criteria and that RRAD failed to conform with respect to certain criteria. At that point, assuming that RRAD's application indeed failed to conform to certain criteria, it would have been appropriate for the Agency to proceed with issuing the CON to Duke. Nevertheless, the Agency, as stated in its seventy-four (74) pages of findings, additionally "conducted a comparative analysis of [Duke's and RRAD's applications] to decide which [one] should be approved," assuming that RRAD's application did satisfy all of the criteria. *See id.* at 385, 455 S.E.2d at 461.

The Agency, in its discretion, used seven comparative factors in reviewing the CON applications: (1) geographic distribution, (2) demonstration of need, (3) access by underserved groups, (4) ownership of fixed MRI scanners in Wake County, (5) projected average gross revenue per procedure, (6) projected average net revenue per procedure, and (7) projected average operating expense per procedure. This comparative analysis led the Agency to approve and award the CON to Duke.

However, in the contested case hearing, the ALJ deviated from the above factors and used two additional factors: (1) the types of scanners proposed by each applicant, and (2) the timeline of each proposed project. Of note, there was evidence that RRAD's proposed MRI machine was superior to the machine which Duke would use. It is this deviation

and the reliance on additional comparative factors by the ALJ which we must conclude was error.

Indeed, adding two additional comparative factors is not affording deference to the Agency, but rather constitutes an impermissible *de novo* review of this part of the Agency's decision. Such a substitute of judgment by the ALJ is not allowed. *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252.

Evidence was provided that the factors utilized by the Agency have been used in two previous MRI CON decisions and that the additional factors used by the ALJ have not been a part of the Agency's policies and procedures for many years. We note that information pertaining to RRAD's allegedly superior MRI machine was not included in RRAD's application, though it was otherwise presented at the Agency public hearing, but without an expert testifying as to the machine's medical efficacy. Even so, the Agency has the discretion to pick which factors it evaluates in conducting its own comparative analysis. *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 845. Further, regarding the timeline factor used by the ALJ, there was testimony that the Agency puts little, if any, weight to this factor as the factor disadvantages new providers. The ALJ did not determine that the Agency acted arbitrarily and capriciously, but rather simply substituted his own judgment in weighing the factors. However, we cannot say that it was an abuse of discretion for the Agency to rely on the factors that it did.

Separately, RRAD argues that the Agency erred by concluding that its application was not conforming. But even assuming that the Agency incorrectly determined that RRAD's application did not conform to certain criteria, such error was harmless as the Agency proceeded with a comparative analysis of both applications as if RRAD's application did comply.

Therefore, we reverse the Final Decision and reinstate the decision of the Agency.[1]

---

1. We note that a number of additional arguments were made on appeal. Namely, Duke and the Agency also complain that RRAD did not establish substantial prejudice and that the Final Decision was incomplete and untimely by thirty-seven (37) minutes. And RRAD cross-appeals finding of fact number 24 as well as the ALJ's denial of its motion to apply adverse inference based on Duke's alleged spoliation of evidence. However, in light of the ALJ's comparative analysis error and our subsequent reversal of the Final Decision, we decline to address these arguments.

IV. Conclusion

The ALJ erred in disregarding the comparative analysis of the Agency and conducting its own comparative analysis. Thus, we reverse the Final Decision and reinstate and affirm the decision of the Agency awarding the CON to Duke.[2]

REVERSED.

Judge BRYANT concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY, DEFENDANT

No. COA18-895

Filed 7 May 2019

Criminal Law—prosecutor's closing argument—reasonableness of fear—based on race—propriety

In a first-degree murder trial, the prosecutor's closing argument impermissibly suggested that defendant, a white male, acted partly out of fear based on race when he shot the victim, a black male, even though there was no evidence that defendant had a racially motivated reason for his actions. The prosecutor's insinuation that defendant harbored racial bias because he called the party-goers outside his house 'hoodlums' and suspected some of them were gang members was not supported by evidence and constituted a gratuitous injection of race into the trial.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 23 February 2018 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 13 February 2019.

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2. We acknowledge RRAD's motion for leave to file a supplemental brief regarding the ALJ's authority to remand a contested case to the Agency. We deny this motion as our resolution has rendered such an issue moot.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant.

TYSON, Judge.

Chad Cameron Copley ("Defendant") appeals from a judgment entered following a jury's conviction for first-degree murder. We vacate Defendant's conviction and judgment and grant a new trial.

I. Background

On 22 August 2016, Defendant was indicted by a grand jury for first-degree murder. Defendant's trial began on 12 February 2018

A. *State's Evidence*

At trial, the State presented evidence tending to show the following: On 6 August 2016, Jalen Lewis ("Lewis") hosted a party at his parents' home, two or three houses down the street from Defendant's house. One of his guests, Chris Malone ("Malone"), and two companions, David Walker ("Walker"), and Kourey Thomas ("Thomas"), arrived at Lewis's party in Walker's car around midnight, and parked on the street. Malone was acquainted with Lewis. Walker and Thomas were not. Malone entered Lewis's house to ask permission for Walker and Thomas to enter. Walker and Thomas waited outside near the front steps of the house.

Sometime between midnight and 1:00 a.m., a group of approximately twenty people arrived separately from Thomas, Walker, and Malone. Lewis and his friends did not know the group of twenty people. After about ten minutes, the group was asked to leave. The group agreed to leave, and walked toward their cars, congregating near the curb in front of Defendant's house to discuss where to go next.

Defendant, who was inside his home and in his second-story bedroom, became disturbed by the group's noise outside. Defendant called 911 and told the operator he was "locked and loaded" and going to "secure the neighborhood." Defendant also stated, "I'm going to kill him." The operator attempted to obtain more information from Defendant, but the phone call was terminated.

At the same time these events were transpiring, a law enforcement officer was conducting a traffic stop nearby, which caused the lights of his police cruiser to reflect down the street. Thomas and Walker saw

the lights and became worried about the presence of law enforcement because Thomas possessed a marijuana grinder on his person.

Thomas decided to leave the party after seeing the police cruiser's lights. Thomas left the party first. He ran from Lewis's house, and cut across the yard, towards Walker's car. Before he could reach the car, Thomas was shot by Defendant, who fired one shot without warning, from inside the window of his dark, enclosed garage. EMS arrived and transported Thomas to the hospital, where he died as a result of the gunshot.

Wake County Sheriff's Deputy Barry Carroll ("Deputy Carroll") was one of the first investigators to arrive upon the scene. Deputy Carroll approached Defendant's house after observing broken glass in Defendant's driveway and a broken window in the garage. He shined a light through a garage window, and saw Defendant step through a door from the house into the garage. Deputy Carroll asked Defendant if he had shot someone. Defendant admitted shooting Thomas. Deputy Carroll requested Defendant to open the front door. Defendant complied and showed Deputy Carroll the shotgun he had used to fire at Thomas.

At the close of the State's evidence, Defendant moved to dismiss the case. The trial court denied the motion.

B. *Defendant's Evidence*

Defendant testified and presented evidence tending to show the following: Defendant had argued with his wife on the morning of 6 August 2016, and then spent the day at home drinking, sleeping, and "just hanging out in the garage." After going to sleep that evening in his upstairs bedroom, Defendant awoke at approximately 12:30 a.m. Defendant and his wife then had marital relations. Shortly thereafter, Defendant looked out of his bedroom window and saw a group of people in front of his house. Defendant described the group as "yelling and screaming" and "revving their engines."

Irritated at the noise the group made, Defendant yelled out the window, "You guys keep it the f[**]k down; I'm trying to sleep in here." Members of the group yelled back, "Shut the f[**]k up; f[**]k you; go inside, white boy,' things of that nature." Defendant saw "firearms in the crowd[,]" and two individuals "lifted their shirts up" to flash their weapons. He testified that he called 911 at 12:50 a.m. at his wife's request.

When Defendant called 911, he thought his son and his son's friends were outside, and stated his teenaged son was the "him" he referenced he was going to "kill" while on the 911 call. After ending the call with

911, he retrieved his shotgun, loaded it, and walked downstairs into his attached garage.

When he discovered his son was inside the garage and not part of the group outside, he told his son to go upstairs for safety and to get a rifle. He again yelled at the group outside, instructing them to leave the premises and informing them that he was armed. Defendant claimed Thomas began running towards Defendant's house and pulled out a gun. Defendant fired one shot from his shotgun towards Thomas through the window of his garage.

At the close of Defendant's evidence, he renewed his motion to dismiss, which the trial court denied. Following deliberation, the jury found Defendant guilty of first degree murder by premeditation and deliberation and by lying in wait. The trial court sentenced Defendant to life without parole. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues three issues on appeal: (1) the trial court plainly erred by instructing the jury that the defense of habitation was not available if Defendant was the aggressor; (2) the trial court erred by allowing the prosecutor to make egregious, improper, and racially-charged arguments during its closing argument; and (3) the trial court erred by instructing the jury on the theory of lying in wait.

IV. Race-based Argument

We first address Defendant's argument that the trial court erred by overruling his objections to racially-charged statements made by the prosecutor during closing arguments.

During the State's rebuttal closing argument, the prosecutor stated, over Defendant's multiple objections:

> [PROSECUTOR]: And while we're at it . . . I have at every turn attempted not to make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? *The undercurrent that the defendant brought up to you in his closing argument is what did he mean by hoodlums? I never told you what*

he meant by hoodlums. I told you he meant the people outside. *They presented the evidence that* [*Defendant is*] *scared of these black males*. And let's call it what it is. Let's talk about the elephant in the room. [Emphasis supplied].

[DEFENSE COUNSEL]: Objection.

The Court: Overruled.

[PROSECUTOR]: *Let's talk about the elephant in the room*. If they want to go there, consider it. And is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. *Ask yourself if Kourey Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying* [*sic*] *dead bleeding in that yard*? [Emphasis supplied].

[DEFENSE COUNSEL]: Objection.

The COURT: Overruled.

[PROSECUTOR]: Think about it. I'm not saying that's why he shot him, *but it might've been a factor he was considering*. You can decide that for yourself. You've heard all the evidence. Is it reasonable that *he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence*. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, *a fear based out of hatred or a fear based out of race is not a reasonable fear*, I would submit to you. *That's just hatred*. And I'm not saying that's what it is here, but *you can consider that*. And if that's what you think it was, then maybe it's not a reasonable fear. [Emphasis supplied].

A. *Standard of Review*

The Supreme Court of North Carolina held that a defendant's objection made during closing argument should be reviewed as if the

defendant had objected to every instance of the challenged statements. *State v. Walters*, 357 N.C. 68, 104, 588 S.E.2d 344, 365, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). In *Walters*, the prosecutor made a closing argument comparing the defendant to Adolf Hitler. *Id.* The defendant's counsel objected, and the trial court overruled the objection. *Id.* The prosecutor then continued making allusions comparing the defendant to Hitler.

Our Supreme Court reasoned:

> Whereas it is customary to make objections during trial, counsel are more reluctant to make an objection during the course of closing arguments "for fear of incurring jury disfavor." Defendant should not be penalized twice (by the argument being allowed and by her proper objection being waived) because counsel does not want to incur jury disfavor. Therefore, defendant properly objected to the prosecutor's argument, and no waiver occurred by defendant's failure to object to later references to Hitler.

Id. (citation omitted).

When a defendant properly objects to closing argument, the Court must determine if "the trial court abused its discretion by failing to sustain the objection." *Id.* at 104, 588 S.E.2d at 366 (citation omitted). We "first determine if the remarks were improper. Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations and internal quotation marks omitted). Following *Walters*, Defendant's multiple objections at trial and arguments against the prosecutor's racial comments are preserved for appellate review. *See id.*

"When a court determines that an argument is improper, a defendant must prove that the statements were of such a magnitude that their inclusion prejudiced [the] defendant and that a reasonable possibility exists that a different result would have been reached had the error not occurred." *State v. Dalton*, 243 N.C. App. 124, 135, 776 S.E.2d 545, 553 (2015) (alteration in original) (internal quotation marks and citation omitted), *aff'd*, 369 N.C. 311, 794 S.E.2d 485 (2016).

B. *Closing Arguments*

This Court has recently decided a large number of appeals in which prosecutors made improper comments and statements during closing arguments. *See, e.g.*, *State v. Degraffenried*, __ N.C. App. __, __, 821 S.E.2d 887, 889 (2018) (holding that prosecutor made improper

reference to the defendant's exercise of his right to trial by jury); *State v. Phachoumphone*, __ N.C. App. __, __, 810 S.E.2d 748, 759 (holding that prosecutor inappropriately cited witnesses' out-of-court statements as substantive evidence), *review allowed*, __ N.C. __, 818 S.E.2d 111 (2018); *State v. Madonna*, __ N.C. App. __, __, 806 S.E.2d 356, 363 (2017) (holding that prosecutor improperly stated that the defendant had lied to the jury), *review denied*, 370 N.C. 696, 811 S.E.2d 161 (2018).

Our Supreme Court has stated: "The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of an accused." *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978) (citations omitted).

The General Rules of Practice for the Superior and District Courts provide, in relevant part: "Counsel are at all times to conduct themselves with dignity and propriety[,]" and "[t]he conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness[.]" Gen. R. Pract. Super. and Dist. Ct. 12, 2019 Ann. R. N.C. 10-12.

The Preamble to the North Carolina Revised Rules of Professional Conduct states that "A lawyer, as a member of the legal profession, is . . . an officer of the legal system, and a public citizen having special responsibility for the quality of justice." Rule of Professional Conduct 3.4(e) states that "A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence[.]" All licensed attorneys, whether representing the State or a defendant, must be ever mindful of their oaths and duties as officers of the court and the important roles they serve in the impartial administration of justice. *See id.*

C. *Injection of Race*

Long-standing precedents of the Supreme Courts of the United States and North Carolina prohibit superfluous injections of race into closing arguments. "The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 95 L. Ed. 2d 262, 289 n.30 (1987) (citation omitted). "[P]rosecutor[s] may not make statements calculated to engender prejudice or incite passion against the defendant. Thus, overt appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible. Nor may a prosecuting attorney emphasize race, even in neutral terms, gratuitously." *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 245, 259 (1994) (citations and internal quotation marks omitted), *disapproved of on other grounds by*

State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997). Gratuitous appeals to racial prejudice "tend to degrade the administration of justice." *Battle v. United States*, 209 U.S. 36, 39, 52 L. Ed. 670, 673 (1908).

Our Supreme Court has instructed: "Closing argument may properly be based upon the evidence and the inferences drawn from that evidence." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001) (citing *State v. Oliver*, 309 N.C. 326, 357, 307 S.E.2d 304, 324 (1983)). "Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate." *Id.* (emphasis supplied) (citing *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984)).

In *Moose*, our Supreme Court held a white defendant's reference to a black victim as a "damn ni[**]er" along with evidence that the victim was seen driving through a white residential community, was sufficient evidence to support a prosecutor's closing argument that the victim's murder was, in part, racially motivated. 310 N.C. at 492, 313 S.E.2d at 515. Unlike the facts in *Moose*, no evidence presented to the jury in this case tends to suggest Defendant had a racially motivated reason for shooting Thomas.

Here, the prosecutor prefaced his final argument by acknowledging the absence of any evidence of racial bias: "I have at every turn attempted not to make . . . [race] what this case is about." Despite the absence of evidence, he then argued that because Defendant's race is white, he was motivated to shoot and kill Thomas because he was black.

The prosecutor asserted in his closing argument: "They presented the evidence that he's scared of these black males." Nothing in the evidence presented to the jury tends to support this assertion in the prosecutor's argument that Defendant feared or bore racial hatred towards the individuals outside of his home because they were black. The only evidence submitted to the jury regarding race was Defendant's testimony that the members of the group outside his house had told him to "go inside, white boy," after he had raised his bedroom window and shouted at them to quiet down shortly before 12:50 a.m. Race was irrelevant to Defendant's case.

In the final argument, the prosecutor noted the evidence that Defendant claimed to be fearful of the group in the yard because he thought they may be in a gang: "They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang."

In its brief on appeal, the State attempts to find some evidentiary basis for the racial comments in the closing argument, but in this effort inadvertently acknowledges the complete absence of evidence regarding race. In short, the State equates gang membership to black males. The State specifically argues Defendant presented evidence that the "partygoers included suspected gang members" and "[t]heir affiliation was suspected based on their wearing gang colors, particularly red." The State includes a footnote noting "Red is worn by members of the Bloods, a *primarily African American street gang*. *See*, *e.g.*, *State v. Kirby*, 260 N.C. App. 446, 449, 697 S.E.2d 496, 499 (2010); *State v. Riley*, 159 N.C. App. 546, 549, 583 S.E.2d 379, 382 (2003)." (Emphasis supplied). In the *Kirby* and *Riley* cases, there was evidence that Bloods gang members wore red articles and clothing. *See Kirby*, 206 N.C. App. at 449, 697 S.E.2d at 499 ("Defendant also said that he felt disrespected by Dunn because he was wearing a "Scream" mask with red on it, like blood, because defendant was a member of the Blood gang and Dunn was a member of the Folk gang."); *Riley*, 159 N.C. App. at 549, 583 S.E.2d at 382 ("Officer Smith said that "Bloods" typically wear the color red and "Crips" wear the color blue, although at times, rival gang members will wear the other gang's colors to get closer in order to commit violent acts.").

There is no mention in either *Kirby* or *Riley* that the Bloods gang is "primarily African American" and no evidence was presented in this case of the race of members of any gang. Citations to other cases does not provide evidence in this case of any association between the color red, gangs, and black males. No evidence was presented to the jury in this case the Bloods are a "primarily African American" gang, and there was no evidence that Defendant was aware of the typical racial profile of any gang. The only evidence was that Defendant, as well as the hosts of the party, suspected gang activity, and that they were fearful, was because they knew that gang members may carry guns. Their fear was based upon their knowledge of the dangers posed by guns and gangs generally; the fear was not associated with the race of the group ejected from the party.

After its argument equating gang membership and black men, the State argues in its appellee brief that the prosecutor's racially-based argument was proper because:

> [T]he jury had to determine whether Defendant's fear was reasonable. Insofar as Defendant expressed a fear of gang members wearing gang colors, *the prosecutor aptly inquired whether a white male would elicit the same scrutiny*. As the prosecutor said, a fear based on race is

> not a reasonable fear. The prosecutor is permitted to argue the law, and these remarks were not improper. *See Diehl*, 353 N.C. at 436, 545 S.E.2d at 187. [Emphasis supplied].

The State's argument insinuates Defendant could have believed the individuals outside his house were gang members because they were black. No admitted evidence suggests Defendant might have thought the individuals were gang members because of their race. The State's argument that Defendant might have inferred the individuals were gang members because of their race is offensive, invalid, and not supported by any evidence before the jury.

No logical connection exists between Defendant recounting that he was referred to as "white boy" by those individuals outside his home and the prosecutor's invidious inference that Defendant held an irrational fear or exhibited hatred of Thomas and the other black partygoers to allow this closing argument. The prosecutor's comments are a wholly gratuitous injection of race into the trial and were improper. *See Williams*, 339 N.C. at 24, 452 S.E.2d at 259. The prosecutor's comments are especially egregious because he made them during the State's final rebuttal argument to the jury, which left defense counsel with no opportunity to respond, other than by objecting.

The prosecutor also asserted Defendant had referred to the individuals outside his house as "hoodlums." No evidence suggests Defendant's use of the word "hoodlums" bore any racial connotation. On direct examination, Defendant testified he had used the term "hoodlum" to mean "Like a juvenile delinquent, someone that will not listen to authority or listen to their parents and just kind of takes [*sic*] every day as that day and doesn't care about tomorrow. They're living in that day because that's all they care about." Defendant also described his own teen-aged son as a "hoodlum."

"Hoodlum" is defined as: "1. A gangster; a thug. 2. A tough, often aggressive or violent youth." Hoodlum, The American Heritage Dictionary of the English Language, Fifth Edition, https://ahdictionary.com/word/search.html?q=hoodlum (last visited on 4 April 2019). Nothing in either Defendant's use of the term nor the dictionary definition of "hoodlum," suggests any racial bias or animus on Defendant's part. No evidence presented at trial suggested the word "hoodlum" has a racial connotation. The prosecutor's injection of racially-based arguments were gratuitous and improper. *Williams*, 339 N.C. at 24, 452 S.E.2d at 259.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*,

443 U.S. 545, 555, 61 L. Ed. 2d 739 (1979). The United States Court of Appeals for the Fourth Circuit reviewed a case from North Carolina, which involved a prosecutor's jury argument that a white woman would never have consensual intercourse with a black man. *Miller v. North Carolina*, 583 F.2d 701, 707 (1978). The Court held that the prosecutor's statements denied the defendants of their constitutional right to a fair trial and stated "an appeal to racial prejudice impugns the concept of equal protection of the laws. One of the animating purposes of the equal protection clause of the fourteenth amendment, and a continuing principle of its jurisprudence, is the eradication of racial considerations from criminal proceedings." *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978).

The United States Court of Appeals for the Second Circuit persuasively stated in *McFarland v. Smith*, 611 F.2d 414, 416-17 (2nd Cir. 1979):

> Race is an impermissible basis for any adverse governmental action in the absence of compelling justification. . . . To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.

The prosecutor's objected-to rebuttal jury arguments served to "draw the jury's attention" to Defendant's race being white and Thomas's race being black, inject prejudice, and unjustifiably suggested the jury could or should infer Defendant is racist. *See id.*

D. *Other Jurisdictions*

Courts of other federal and state jurisdictions have also granted new trials when prosecutors had gratuitously injected race into closing arguments. *See*, *e.g.*, *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (awarding a new trial where prosecutor twice called two "African–American Defendants 'bad people' and [called] attention to the fact that the Defendants were not locals."), *abrogated on other grounds by Watson v. United States*, 552 U.S. 74, 169 L. Ed. 2d 472 (2007); *Tate v. State*, 784 So. 2d 208, 216 (Miss. 2001) (holding prosecutor's comments regarding defendant's allegedly racist sentiments were improper and prejudicial where race was irrelevant to the defendant's assault charge).

In *State v. Cabrera*, 700 N.W.2d 469, 473 (Minn. 2005), the Supreme Court of Minnesota reviewed a prosecutor's race-based closing argument

made during a first-degree murder trial. During closing argument the prosecutor stated:

> Prosecutor: Now, the defense case in addition to the-in addition to just throwing mud on young black men and saying that they're-if they're young black men they must be in gangs-
>
> Defense: Objection, Your Honor. It was never our contention to be racist in this case.
>
> Court: Overruled. It's argument.

Id. at 474.

During the rebuttal portion of closing argument, the prosecutor also stated:

> Finally, the other thing you didn't hear in the courtroom, other than counsel who apparently is an expert on gangs, you heard nothing about gangs. You heard nothing about gangs other than what came from the State's witnesses telling about their past association and some wild and, I submit, racist speculation on the part of counsel here, that *because these men who happen to be black are in-have been in gangs in the past*, despite their testimony about trying to get on with their lives, that they are people to be feared, they're *rough characters*. Well, *we know what that's a code word for*. He's a big, strong black man, but he's a rough character.
>
> Members of the Jury, this is not about race.

Id. (emphasis supplied). The defense counsel also objected to this comment, which the trial court overruled. *Id.*

On appeal, the Supreme Court of Minnesota noted: "The defense never mentioned the race of a witness or even implied that race was a factor in this case during his examination of witnesses or in closing argument." *Id.* The Court reasoned "the defense properly objected to the prosecutor's improper statements, but was erroneously overruled. Working in tandem, the improper argument and the court's ruling may have led the jury to conclude that defense counsel himself was racist-an implication wholly unsupported by the record." *Id.* at 474-75. The Court concluded "that the prosecutor's statements injecting race into closing argument were serious prosecutorial misconduct." *Id.* at 475.

The Court ultimately held that the prosecutor's misconduct warranted a new trial, despite the strong evidence of guilt, because:

> Bias often surfaces indirectly or inadvertently and can be difficult to detect. We emphasize, nonetheless, that the improper injection of race can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible. Affirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled.

Id. (citation and quotation marks omitted). This reasoning of the Supreme Court of Minnesota, regarding the dangers of gratuitously injecting race into closing argument and to grant a new trial in that first-degree murder case, provides a persuasive and compelling basis for granting Defendant a new trial. *See id.*

E. *State v. Jones*

With regard to this State's precedents, Defendant cites our Supreme Court's opinion in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002). In *Jones*, the defendant was also charged with first-degree murder. *Id.* at 119, 558 S.E.2d at 99. The prosecutor referenced the Columbine school shooting and the Oklahoma City bombing during closing arguments and attempted to link those tragedies to the tragedy of the victim's death, even though they were wholly unrelated events. *Id.* at 132, 558 S.E.2d at 107.

Our Supreme Court held that this closing argument was improper because: "(1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Id.*

Our Supreme Court held the statements were prejudicial because:

> The impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions. Moreover, the offensive nature of the remarks exceeds that of other language that has been tied to prejudicial error in the past. *See, e.g.*, *State v. Wyatt*, 254 N.C. 220, 222, 118 S.E.2d 420, 421 (1961) (holding that a prosecutor who described defendants as "two of the

> slickest confidence men" committed reversible error); *State v. Tucker*, 190 N.C. 708, 709, 130 S.E. 720, 720 (1925) (holding that it was prejudicial error for a prosecutor to say that the defendants "look[ed] like . . . (professional) bootleggers"); *State v. Davis*, 45 N.C. App. 113, 114-15, 262 S.E.2d 329, 329-30 (1980) (holding that it was prejudicial for a prosecutor to call the defendant a "mean S.O.B."). As a result, we hold that the trial court abused its discretion[.]

Id. at 132-33, 558 S.E.2d at 107.

Here, no admitted evidence, including Defendant being told to "go inside, white boy," or his use of the word "hoodlum," tended to show or support any inference Defendant had shot Thomas for racially-prejudiced reasons. The prosecutor's comments improperly cast Defendant as a racist, and his comment implying race was "the elephant in the room" is a brazen and inflammatory attempt to interject race as a motive into the trial and present it for the jury's consideration. *Williams*, 339 N.C. at 24, 452 S.E.2d at 259.

As in *Jones*, the prosecutor's appeal to the jury's emotions "is too grave to be easily removed from the jury's consciousness." *Id.* at 132, 538 S.E.2d at 107. The offensive nature of the prosecutor's comments exceeded language that our Supreme Court in *Jones* noted was held to be prejudicial error warranting new trials in past cases. *See id.*

The trial court committed prejudicial error by overruling Defendant's repeated objections and by failing to instruct the jury to disregard the prosecutor's inflammatory comments or to declare a mistrial. Defendant is entitled to a new trial. *Id.* at 132-33, 558 S.E.2d at 107.

F. *Pattern Jury Instruction*

As we have determined Defendant must receive a new trial based upon the improper injection of race into the closing argument, we need not and will not address Defendant's remaining issues, which may not arise upon remand. We note that Defendant's other issues are based upon the jury instructions, and particularly the combination of theories of self-defense, defense of habitation, initial aggressor, and lying in wait. We recognize the difficulty of crafting jury instructions in a case with this combination of issues. For guidance on remand, we point out one potential problem with the pattern jury instructions.

The trial court gave jury instructions on both self-defense and defense of habitation. The recently revised defense of habitation statute defines "home" as "A building or conveyance of any kind, to include

its *curtilage*, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." N.C. Gen. Stat. § 14-51.2(a)(1) (2017) (emphasis supplied).

The pattern instruction for the defense of habitation does not define the term "home." Footnote 1 of the pattern instruction references *State v. Blue*, 355 N.C. 79, 565 S.E.2d 133 (2002), for the principle that the

> defense of habitation can be applicable to the porch of a dwelling under certain circumstances and that the question of whether a porch, garage, or other appurtenance attached to a dwelling is within the home . . . for purposes of N.C. Gen. Stat. § 14-51.1 is a question best left to the jury.

N.C.P.I. Crim.-308.80, fn. 1 (2012).

N.C. Gen. Stat. § 14-51.1, referenced above, was the former defense of habitation statute, which was repealed upon the enactment of N.C. Gen. Stat. § 14-51.2. 2011 Sess. Laws 268, § 2. The now-repealed N.C. Gen. Stat. § 14-51.1 did not provide a definition for "home." N.C.P.I. Crim. 308.80's reference to *State v. Blue*, which interpreted a now-repealed statute, limited the reach and boundaries of "home."

Furthermore, the absence of any definition of "home" to correctly reflect the now-controlling definition in N.C. Gen. Stat. § 14-51.2(a)(1), which expands the definition and incorporates "curtilage" as part of the "home," is potentially prejudicial to a defendant. The term "curtilage" is not defined within N.C. Gen. Stat. § 14-51.2, but in other contexts, "curtilage" has been construed to mean "at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

A jury instruction given at a trial, based upon the current pattern instruction, could lead a jury to believe defense of habitation is only appropriate when an intruder has entered, or was attempting to enter a physical house or structure, and not the curtilage or other statutorily defined and included areas.

In the instant case, the trial court failed to provide a definition for "home" in the jury instructions. While not argued, a discrepancy exists between N.C.P.I. Crim. 308.80 and the controlling N.C. Gen. Stat. § 14-51.2. The jury could have potentially believed that Defendant could only have exercised his right of self-defense and to defend his habitation only if Thomas was attempting to enter the physical confines of Defendant's house, and not the curtilage or other areas.

The absence of a definition for "home" or "curtilage" in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of "home" as is now required by N.C. Gen. Stat. § 14-51.2.

V. Conclusion

The prosecutor's argument that Defendant shot Thomas because he was black is not supported by any admitted evidence and is wholly gratuitous and inflammatory.

The prosecutor's argument was an improper and prejudicial appeal to race and the jurors' "sense of passion and prejudice." *See Jones*, 355 N.C. at 132, 558 S.E.2d at 107; *see also McCleskey*, 481 U.S. at 309 n.30, 95 L. Ed. 2d at 289 n.30; *Williams*, 339 N.C. at 24, 452 S.E.2d at 259.

The trial court prejudicially erred by overruling Defendant's repeated objections and by failing to strike the prosecutor's inflammatory and improper statements. We vacate Defendant's conviction and the trial court's judgment, and remand for a new trial with proper instructions. *It is so ordered.*

NEW TRIAL.

Judge STROUD concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. I would hold the trial court did not abuse its discretion in overruling defendant's objection to the portion of the State's closing argument that defendant argues, and the majority agrees, violated defendant's constitutional rights by allowing the State to argue the victim would not have been shot if he had been white. During closing argument, the State argued:

> [THE STATE]: And while we're at it . . . I have at every turn attempted to not make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? The undercurrent that the defendant brought up to you in his closing argument is what did he

> mean by hoodlums? I never told you what he meant by hoodlums. I told you he meant the people outside. They presented the evidence that he's scared of these black males. And let's call it what it is. Let's talk about the elephant in the room.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Let's talk about the elephant in the room. If they want to go there, consider it. And why is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. Ask yourself if Kourey Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying [*sic*] dead bleeding in that yard?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Think about it. I'm not saying that's why he shot him, but it might've been a factor he was considering. You can decide that for yourself. You've heard all the evidence. Is it reasonable that he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, a fear based out of hatred or a fear based out of race is not a reasonable fear, I would submit to you. That's just hatred. And I'm not saying that's what it is here, but you can consider that. And if that's what you think it was, then maybe it's not a reasonable fear.

Defendant contends these statements were improper because there was no evidence defendant was motivated by hatred or would have not shot the victim if he were white, and this argument is a ploy to encourage jurors to convict defendant based on passion.

Our Court reviews alleged "improper closing arguments that provoke timely objection from opposing counsel" for "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). "[T]o assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision." *Id.* (citation and internal quotation marks omitted).

"The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30, 95 L. Ed. 2d 262, 289 n. 30 (1987) (citation omitted). Therefore, although parties are generally "given wide latitude in their closing arguments to the jury," *State v. Fletcher*, 370 N.C. 313, 319, 807 S.E.2d 528, 534 (2017) (citation and internal quotation marks omitted), prosecutors cannot "make statements calculated to engender prejudice or incite passion against the defendant. Thus, overt appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible." *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 245, 259 (1994) (citations and internal quotation marks omitted), *disapproved of on other grounds by State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997). Prosecutors also may not "emphasize race, even in neutral terms, gratuitously." *Id.* (citations omitted).

However, a prosecutor may make "[n]onderogatory references to race . . . if material to issues in the trial and sufficiently justified to warrant the risks inevitably taken when racial matters are injected into any important decision-making." *Id.* (citation and internal quotation marks omitted). As such, "argument acknowledging race as a motive or factor in a crime may be entirely appropriate." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001) (citing *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984) (holding there was sufficient evidence to support jury argument that murder was, at least in part, racially motivated where a white defendant used an ignoble racial slur to refer to a black victim, and evidence showed the victim was seen driving through a white community)).

I would hold the court did not abuse its discretion in overruling defendant's objection to this portion of the State's closing argument.

Throughout defendant's trial, the State alleged defendant's motive was that defendant had a bad day and was "ticked off" and was not "going to take it anymore." The State brought up race for the first time in closing argument. These comments were brief, and not an appeal to racial animosity. Instead, the comments argued it would be unreasonable

to be afraid of the group outside the house because of race, and that race could have been a factor considered by defendant. Under the facts of this case, where the State's evidence showed a lone, agitated white defendant threatened a large group of black individuals, defendant alleged they referred to him as a "white boy," and then hid and waited, eventually shooting a young black man who entered the area along the curb of his yard, the trial court did not abuse its discretion in allowing the State's closing argument to acknowledge the potential for racial bias as a factor affecting the crime.

Although I disagree with the majority on this issue, I agree with its disapproval of the State's argument that equates gang membership with race. No evidence in the record supports this equivalency. I admonish the State to refrain from arguments that are unsupported by the evidence, but, rather, that play to offensive stereotypes.

Because I disagree with the majority's holding, I must discuss defendant's remaining arguments on appeal: (1) that the prosecutor misstated the law on the habitation defense twice during his closing argument; (2) that the trial court plainly erred by instructing the jury that the defense of habitation was not available if defendant was the aggressor; and (3) that the trial court erred by instructing the jury on the theory of lying in wait.

I. Closing Argument

Defendant argues the prosecutor misstated the law on the habitation defense twice during his closing argument. He did not object on this basis at trial. If opposing counsel fails to object to the closing argument at trial, we review alleged improper closing arguments for

> whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted).

First, defendant contends the State erred when it told the jury defendant could be found to be the aggressor if he left the second floor of

his house and went downstairs to the garage because this argument is contrary to *State v. Kuhns*, __ N.C. App. __, 817 S.E.2d 828 (2018) and grossly prejudicial.

Defendant does not quote the language he refers to as egregious, and only provides a citation to a page in the transcript where the prosecutor discusses the aggressor doctrine. Upon review of the transcript, it is clear the references to the aggressor by the prosecutor in this portion of the transcript arose in the context of self-defense, *not the habitation defense*:

> And I'm going to talk more about some of the things that he told you later, but what I want to get to is this excused killing by *self-defense*, okay?
>
> . . . .
>
> He doesn't have to retreat from his home, but if you're upstairs and somebody makes a show of force at you, it's not retreating to stay upstairs. It's, in fact, the opposite of that, right? But if you take your loaded shotgun and go down to the garage and if you buy him at his word, which I don't know that you can, you are not retreating. You are being aggressive. You're continuing your aggressive nature in that case.

(Emphasis added). Therefore, defendant's argument that the trial court erred by failing to intervene when the State misstated the law on the *habitation defense* is without merit.

Second, defendant argues the State incorrectly added exceptions to the habitation defense that our statutes only permit as exceptions to self-defense. Defendant maintains the State committed this error in the following portion of its argument:

> And I'm going to talk more about some of the things that he told you later, but what I want to get to is this excused killing by *self-defense*, okay?
>
> . . . .
>
> You can consider the size, age, strength of defendant as compared to the victim. . . . You've got somebody who's standing at this point in a yard and you've got somebody on a second floor window. How much danger is he to him at that point? Especially at that point, he's not even saying

> they're pointing a gun at him. All they've done is this – (indicating) – if you buy him at his word.
>
> . . . .
>
> Reputation for violence, if any, of the victim, you didn't hear that he was a violent guy. You didn't hear that he was a gangbanger. All you heard is that he was actually the opposite of that, right?

(Emphasis added). I disagree. As with defendant's first argument, this portion of the transcript refers to self-defense, not the habitation defense. I would hold defendant's argument is without merit.

II. Habitation Defense

Next, defendant argues the trial court plainly erred by instructing the jury that the habitation defense was not available if defendant was the aggressor.

Defendant alleges plain error because he did not object on this basis at trial. N.C.R. App. P. 10(a)(2), (a)(4) (2019). To demonstrate the trial court plainly erred, defendant "must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. The error must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Tirado*, 358 N.C. 551, 574, 599 S.E.2d 515, 531-32 (2004) (citations and internal quotation marks omitted).

Our statutes provide for the defense of habitation, in pertinent part, as follows:

> The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home . . . or if that person had removed or was attempting to remove another against that person's will from the home. . . .
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible

> entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2017). Any "person who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence." *Id.* § 14-51.2(d).

Distinct from the defense of habitation, the General Assembly set out the requirements for self-defense in N.C. Gen. Stat. § 14-51.3 (2017). Both the defense of habitation and self-defense are "not available to a person who used defensive force and who . . . [i]nitially *provokes* the use of force against himself or herself" unless either of the following occur:

> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

Id. § 14-51.4 (2017) (emphasis added).

Here, the trial court instructed the jury in conformity with Pattern Jury Instruction 308.80 of the North Carolina Pattern Jury Instructions, and included an instruction on provocation that conformed with N.C. Gen. Stat. § 14-51.4 as follows:

> The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's home. The defendant is justified in using deadly force in this matter if, and there are four things. Number one, such force was being used to prevent the forcible entry into the defendant's home, and, two, the defendant reasonably believed that the intruder would kill or inflict serious bodily harm

> to the defendant or others in the home, or intended to commit a felony in the home, and, three, the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry into the defendant's home, and, *four*, *the defendant did not initially provoke the use of force against himself*, *or if the defendant did provoke the use of force*, *the force used by the person provoked was so serious that the defendant reasonably believed that he was in imminent danger of death or serious bodily harm*, *and the use of force likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger*.

(Emphasis added). Thus, the trial court did not reference defendant as an "aggressor" while instructing on the defense of habitation. However, once the trial court completed its instruction on the habitation defense, it referenced defendant as an "aggressor" when it gave the self-defense instruction.

> The defendant would not be guilty of any murder or manslaughter if the defendant acted in *self-defense* and *if the defendant was not the aggressor in provoking the fight* and did not use excessive force under the circumstances. One enters a fight voluntarily if one uses towards one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses defensive force is justified if the person withdraws in good faith from physical contact with the person who was provoked and indicates clearly that he decides to withdraw and terminate the use of force but the person who was provoked continues or resumes the use of force. . . .

(Emphasis added).

Defendant's brief fails to identify the direct quotation or contested instruction wherein the trial court instructed the *defense of habitation* is unavailable to an *aggressor*, and we have not found such an instruction. Instead, the trial court instructed that the defense of habitation is unavailable to a defendant who initially provokes the use of force

against himself, and that *self-defense* is unavailable when a defendant is an *aggressor in provoking the fight*. Thus, defendant's argument misconstrues the jury instructions.

Nonetheless, defendant argues the jury would not have understood the aggressor doctrine to be applicable to the habitation defense merely because the self-defense instruction occurred after the habitation defense.

I disagree and decline to conflate these defenses, as the statutory scheme of our General Assembly and the decisions of this Court have distinguished the defense of habitation and self-defense. *Compare* N.C. Gen. Stat. § 14-51.2 *with* N.C. Gen. Stat. § 14-51.3; *see State v. Roberson*, 90 N.C. App. 219, 222, 368 S.E.2d 3, 6 (1988) (distinguishing the rules of the defense of habitation from the rules of self-defense). Moreover, although N.C. Gen. Stat. § 14-51.4 states that neither defense may be utilized where a defendant provoked the use of force, our decisions have only referred to a defendant's status as an "aggressor" with regard to self-defense, and has never applied this language to the defense of habitation.

I also disagree that the jury would have confused these instructions, as our Court must presume the jury "attend[s] closely the particular language of the trial court's instructions in a criminal case and strive[s] to understand, make sense of, and follow the instructions given them." *State v. Wirt*, __ N.C. App. __, __, 822 S.E.2d 668, 674, 2018 WL 6613780, at *7 (2018) (citation and internal quotation marks omitted).

To the extent defendant argues the court plainly erred in determining there was sufficient evidence to instruct on provocation as an exception to the defense of the home, I disagree.

We review for plain error because defendant did not object on this basis at trial. N.C.R. App. P. 10(a)(2), (a)(4). "Jury instructions must be supported by the evidence. Conversely, all essential issues arising from the evidence require jury instructions." *State v. Bagley*, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) (citations and internal quotation marks omitted). Therefore, to support an instruction on provocation, the State must present evidence that the defendant provoked the use of force.

I would hold the State put forth sufficient evidence that defendant provoked any force used against him where defendant himself testified he "escalated the situation" by arming himself and yelling at the people who were "minding their own business out in the street area." Accordingly, I would hold defendant's argument that the jury instructions on the habitation defense constituted plain error is without merit.

III. Lying in Wait

Finally, defendant argues the trial court committed reversible error by instructing the jury on the theory of lying in wait because the evidence did not support the instruction.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted). However, if "a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Thompson*, 328 N.C. 477, 489, 402 S.E.2d 386, 392 (1991).

Our Supreme Court defines "first-degree murder perpetrated by means of lying in wait" as "a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990) (citations and internal quotation marks omitted). The perpetrator must intentionally assault "the victim, proximately causing the victim's death." *State v. Grullon*, 240 N.C. App. 55, 60, 770 S.E.2d 379, 383 (2015) (citation and internal quotation marks omitted).

Defendant argues the evidence does not support an instruction on first degree murder by lying in wait because the evidence did not show he laid in wait to shoot a victim, but, rather, it shows he armed himself to protect his house from intruders until police arrived to disperse the individuals gathered in front of his house. I disagree.

The State put forth sufficient evidence to support an instruction on lying in wait, even assuming *arguendo* defendant offered evidence that suggests otherwise. The State's evidence shows defendant concealed himself in his darkened garage with a shotgun, equipped with a suppression device. Defendant shot the victim, firing the shotgun through the garage's window. The shot bewildered bystanders because it was unclear what happened, and defendant had not warned the crowd before firing his weapon.

This evidence supports the lying in wait instruction because it tends to show defendant stationed himself, concealed and waiting, to shoot the victim, and this action proximately caused the victim's death. Accordingly, I would hold the trial court did not err when it instructed the jury on murder by lying in wait.

IV. Conclusion

In conclusion, I must also note that, in addition to briefing an issue raised by defendant, the majority also undertakes review of an issue at trial that was not raised on appeal—whether the trial court erred because it used the pattern jury instruction for the defense of habitation, which the majority avers does not define "home" consistent with North Carolina law. Although the majority states that the pattern jury instruction should be reviewed and updated based on its analysis, I note that this conclusion is *dicta*.

For the forgoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ALEXANDER DEJESUS, AKA ALEXANDER SIGARU-ARGUETA

No. COA18-750

Filed 7 May 2019

1. Confessions and Incriminating Statements—corpus delicti rule—statutory rape—multiple counts—victim pregnant by defendant

There was substantial independent evidence to establish the trustworthiness of defendant's extrajudicial confession that he engaged in vaginal intercourse with the 12-year-old victim on at least three occasions to satisfy the corpus delicti rule where the victim became pregnant by defendant, defendant lived in the victim's home and thus had the opportunity to commit the crimes, and defendant's confession was knowing and voluntary.

2. Evidence—authentication—copy of birth certificate—prima facie showing

A copy of a victim's Honduran birth certificate was properly authenticated for admission into evidence where nothing indicated that the document was forged or inauthentic, the school social worker testified that the school would not have made a copy of the birth certificate unless it had the original, and the police detective testified that the school's incident report identified the victim's birth date by the same day, month, and year as the birth certificate copy.

3. Evidence—hearsay—exceptions—public records and reports —trustworthiness—birth date in copy of birth certificate

The statement of a victim's birth date contained in a photocopy of her birth certificate was sufficiently trustworthy to be admissible under the public record exception to the hearsay rule. Nothing indicated that the birth date on the document lacked trustworthiness, and other evidence—including the police detective's testimony that the victim appeared "10 or 11 years old" at the time he interviewed her and photographs taken during her pregnancy—supported the date in the document.

4. Appeal and Error—preservation of issues—failure to object at trial—failure to file notice of appeal—request for two extraordinary steps to reach merits

Where defendant failed to argue before the trial court that satellite-based monitoring (SBM) would constitute an unreasonable Fourth Amendment search and also failed to file a written notice of appeal from the order enrolling him in SBM, the Court of Appeals declined to take the two extraordinary steps of issuing a writ of certiorari to hear his appeal and of invoking Appellate Rule 2 to address his unpreserved constitutional argument.

Judge BERGER concurring in result only.

Appeal by defendant from judgment entered 3 April 2018 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil C. Dalton and Assistant Attorney General Kathryne E. Hathcock, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

ZACHARY, Judge.

Defendant Alexander DeJesus, a.k.a. Alexander Sigaru-Argueta, appeals from a judgment entered upon a bench verdict finding him guilty of three counts of statutory rape of a child. Defendant argues that the trial court erred in (1) denying his motion to dismiss two counts of statutory rape based on the *corpus delicti* rule, (2) admitting a purported

copy of the victim's Honduran birth certificate, and (3) ordering that he enroll in lifetime satellite-based monitoring. We affirm the trial court's denial of Defendant's motion to dismiss, conclude that the trial court did not err in admitting the copy of the victim's Honduran birth certificate, and dismiss Defendant's appeal concerning the trial court's satellite-based monitoring order.

Background

Defendant was indicted on 23 January 2017 for three counts of statutory rape of a child, each with a listed offense date of "April 1, 2016 through May 31, 2016." Defendant waived his right to a jury trial, and a bench trial was thereafter held before the Honorable Carl R. Fox in Wake County Superior Court beginning on 2 April 2018.

The evidence tended to show that Defendant was in a relationship with the victim's mother, and that Defendant, the victim, and the victim's mother were living together during the time in question. Sometime during the fall of 2016, the victim's middle school social worker Megan Vaughan noticed that the victim was visibly pregnant. The victim was in seventh grade at the time. After speaking with the victim, Ms. Vaughan filed an incident report with the Raleigh Police Department.

When Detective Alex Doughty met with the victim on 1 December 2016, she identified Defendant as the father of her child. Detective Doughty took several photographs of the victim in order "to show her youth and the fact of her age being what it was. And, unfortunately, . . . because of the stage of which her stomach appeared to be."

Detective Doughty also interviewed Defendant on 1 December 2016. Detective Doughty testified that during the interview, he "confronted [Defendant] directly" about the paternity of the victim's child:

> [THE STATE:] What was his response to that?
>
> [DETECTIVE DOUGHTY:] I proposed it as an either/or question to him in regards to that I knew that he was the father of the child. What I was concerned about was whether or not that it was consensual or a forced event.
>
> . . . .
>
> Q. What did the defendant say to you about that?
>
> A. He had stated that he had never forced [the victim] and that everything that had occurred between the two of them was consensual.

Q. Now, . . . when he said everything that occurred, did you clarify with him what that meant?

A. He defined that as that they had consensual sex on at least three occasions that he could account for.

Q. And how, if at all, did he describe the type of sex that they had?

A. Just vaginal penile. I went into clarity with him about the several methods in which sex could occur as well as any potential sex offenses involving cunnilingus, fellatio. Again, he denied that there was anything other than just vaginal sex.

. . . .

Q. . . . You said that he said that it was three times?

A. That's correct.

Q. And do you recall anything that he said about those three different times?

A. No. He only indicated that there was three times.

Q. Did he—do you recall whether he said that they were separate three times?

[DEFENSE COUNSEL]: Objection. Leading.

THE COURT: Sustained.

Q. How many different times did he confess to you?

A. Three independent times over the course of, I believe, a month or two. It was maybe several months.

The record indicates that the victim gave birth sometime between 21 January 2017 and 23 January 2017. Thereafter, DNA testing established that Defendant was indeed the father of her child.

Defendant was charged with three counts of statutory rape of a child on the basis of his confession. Pursuant to N.C. Gen. Stat. § 14-27.23, the State was required to establish that the victim was "under the age of 13" and that Defendant was "at least 18 years of age" at the time of the offenses. N.C. Gen. Stat. § 14-27.23(a) (2016). Included in the evidence at trial was Defendant's admission that he was born on 14 October 1994, and that he was therefore 21 years of age during the time alleged in the indictment. The State submitted a purported copy of the victim's

Honduran birth certificate in order to establish that the victim was 12 years old at the time of the incidents. Defendant objected to the admission of the copy of the victim's Honduran birth certificate on authentication and hearsay grounds, but the trial court overruled Defendant's objection and admitted the copy of the birth certificate into evidence.

Neither Defendant, the victim, nor her mother testified at trial, and Defendant presented no evidence. At the close of the evidence, Defendant moved the trial court to dismiss two of the statutory rape charges, arguing that "it only takes one time to get pregnant. So where is the rest of the evidence as it applies to [the remaining two] counts . . . . [T]hat knocks two of the counts out . . . just based on the evidence alone." Defendant noted that the only evidence supporting the remaining two charges was his extrajudicial confession, which Defendant maintained was insufficient under the *corpus delicti* rule.

The trial court denied Defendant's motion to dismiss and found Defendant guilty of three counts of statutory rape of a child. The trial court sentenced Defendant to 300-420 months in the custody of the North Carolina Division of Adult Correction and ordered that he be enrolled in lifetime satellite-based monitoring upon his release. Defendant gave oral notice of appeal from the trial court's judgment in open court. Defendant did not provide written notice of appeal from the trial court's order enrolling him in satellite-based monitoring. However, on 23 August 2018, Defendant filed a petition for writ of certiorari requesting that this Court also review the trial court's satellite-based monitoring order.

Discussion

On appeal, Defendant argues that (1) the trial court erred in denying his motion to dismiss two of his three counts of statutory rape of a child under the *corpus delicti* rule; (2) the trial court erred in admitting the copy of the victim's Honduran birth certificate because it was not properly authenticated and constituted inadmissible hearsay; and (3) the trial court's satellite-based monitoring order must be vacated because the State presented no evidence that Defendant's enrollment would satisfy the Fourth Amendment.

I. Motion to Dismiss

[1] Defendant first challenges the trial court's denial of his motion to dismiss two of his three statutory rape charges, which arose following Defendant's confession that he had vaginal intercourse with the victim on three separate occasions. Defendant recognizes that there was a "confirmatory circumstance to support one count of statutory rape,"

that is, the victim's pregnancy. However, Defendant argues that "[t]here was no evidence corroborating the other two charges" aside from his extrajudicial confession, and therefore his motion to dismiss two counts of statutory rape should have been granted on the basis of the *corpus delicti* rule. We disagree.

a. Standard of Review

We review *de novo* the trial court's denial of a motion to dismiss. *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

> Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

Id. at 150, 749 S.E.2d at 274 (internal citations and ellipses omitted).

Whether a defendant's extrajudicial confession may survive a motion to dismiss depends upon the satisfaction of the *corpus delicti* rule. *Id.* at 151, 749 S.E.2d at 275.

b. The *Corpus Delicti* Rule

It is well settled that "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). Instead, where "the State relies solely on [a] defendant's confession, the State must meet the additional burden imposed by the *corpus delicti* rule," *State v. Sweat*, 366 N.C. 79, 85, 727 S.E.2d 691, 695 (2012), which requires some level of independent corroborative evidence in order "to ensure that a person is not convicted of a crime that was never committed." *Parker*, 315 N.C. at 229, 337 S.E.2d at 491 (quotation marks omitted). "Literally, the phrase '*corpus delicti*' means the 'body of the crime,' " *id.* at 231, 337 S.E.2d at 492 (citation omitted), and essentially "signifies merely the fact of the specific loss or injury sustained, e.g., death of a victim or burning of a house." *Corpus Delicti*, BLACK'S LAW DICTIONARY (10th ed. 2014).

"The foundation for the *corpus delicti* rule lies historically in the convergence of" the following three policy factors:

> first, the shock which resulted from those rare but widely reported cases in which the "victim" returned alive after his supposed murderer had been convicted; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual[;] and, thirdly, the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

Parker, 315 N.C. at 233, 337 S.E.2d at 493 (citation and original alterations omitted).

Under the traditional *corpus delicti* rule, the State is required to "present corroborative evidence, independent of the defendant's confession, tending to show that . . . the injury or harm constituting the crime occurred." *Cox*, 367 N.C. at 151, 749 S.E.2d at 275 (quotation marks omitted). "This traditional approach requires that the independent evidence touch or concern the *corpus delicti*—literally, the body of the crime, such as the dead body in a murder case." *Id.* (quotation marks omitted).

In *Parker*, our Supreme Court examined the shortfalls of the traditional *corpus delicti* rule and concluded that reliance on an extrajudicial confession may be appropriate in certain circumstances, even though "independent proof of the commission of the crime—that is, the *corpus delicti*—is lacking." *Id.* at 152, 749 S.E.2d at 276. The Supreme Court elected to supplement the traditional *corpus delicti* rule by adopting the more modern "trustworthiness" formulation of the rule, which focuses "on the reliability of a defendant's confession." *State v. Messer*, ___ N.C. App. ___, ___, 806 S.E.2d 315, 322 (2017). Under this approach, the State need not provide independent proof of the *corpus delicti* so long as there is "substantial independent evidence tending to establish the trustworthiness of the defendant's extrajudicial confession." *Cox*, 367 N.C. at 152, 749 S.E.2d at 276. Such substantial independent evidence may "includ[e] facts that tend to show the defendant had the opportunity to commit the crime," as well as other "*strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *Parker*, 315 N.C. at 236, 337 S.E.2d at 495. Indeed, while noting that the newly adopted approach relaxed the standard of required corroboration, the *Parker* Court emphasized the need to "remain advertent to the reason for [the *corpus delicti* rule's] existence, that is, to protect against convictions for crimes that have not in fact occurred." *Id.*

c. Application

In the instant case, while the victim's pregnancy corroborated Defendant's confession as to one count of statutory rape of a child, the remaining two counts were supported solely by Defendant's extrajudicial confession. Accordingly, we must determine whether there was substantial independent evidence presented that tended to establish the trustworthiness of Defendant's confession that he engaged in vaginal intercourse with the victim on at least three separate occasions. We conclude that the victim's pregnancy, together with the evidence of Defendant's opportunity to commit these crimes and the circumstances surrounding his statement to detectives, provide sufficient corroboration to engender a belief in the overall truth of Defendant's confession.

Initially, we note that there is no contention in the instant case that Defendant's extrajudicial confession was the product of deception or coercion. *See id.* at 234, 337 S.E.2d at 494 ("The second historical justification for the *corpus delicti* rule relates to the concern that the defendant's confession might have been coerced or induced by abusive police tactics. To a large extent, these concerns have been undercut by . . . the development of . . . doctrines relating to the voluntariness of confessions which limit the opportunity for overzealous law enforcement. These developments make it difficult to conceive what additional function the *corpus delicti* rule still serves in this context." (quotation marks omitted)). Defendant was not under arrest at the time of his interview, but rather traveled "on his own" to the police department in order to speak with Detective Doughty. Nor does the record otherwise indicate that Defendant's confession was involuntary or the product of coercion. Thus, the trustworthiness of Defendant's confession to at least three separate instances of vaginal intercourse with the victim is "bolstered by the evidence that [he] made a voluntary decision to confess" to these crimes. *Cox*, 367 N.C. at 154, 749 S.E.2d at 277.

In addition, according to Detective Doughty, Defendant admitted that he engaged in vaginal intercourse with the victim "on at least three occasions *that he could account for*," evincing Defendant's appreciation and understanding of the importance that his statement be accurate. (Emphasis added). The trustworthiness of Defendant's extrajudicial confession is further reinforced by the fact that Defendant had ample opportunity to commit these crimes, in that Defendant was living in the victim's home during the relevant time frame. *See Parker*, 315 N.C. at 236, 337 S.E.2d at 495 ("[S]ubstantial independent evidence tending to establish [the] trustworthiness [of the accused's confession] includ[es] facts that tend to show the defendant had the opportunity to

commit the crime."). Finally, and most significantly, the undisputed fact that Defendant fathered the victim's child unequivocally corroborated Defendant's statement that he had, in fact, engaged in vaginal intercourse with her. We are satisfied that the "strong corroboration" of Defendant's confession in this respect sufficiently establishes the trustworthiness of his concurrent statement regarding the number of instances that he had sexual intercourse with the victim.

Accordingly, we conclude that there was substantial independent evidence to support the trustworthiness of Defendant's extrajudicial confession that he engaged in vaginal intercourse with the victim "on at least three occasions," and therefore, the *corpus delicti* rule is satisfied. Defendant's confession constitutes substantial evidence that he committed three counts of statutory rape against the victim, and thus the trial court did not err in denying Defendant's motion to dismiss.

II. Foreign Birth Certificate

Defendant next challenges the trial court's admission of the victim's Honduran birth certificate.

To establish the victim's age pursuant to N.C. Gen. Stat. § 14-27.23(a), the State introduced a purported copy of the victim's Honduran birth certificate, which was obtained from the victim's school file (State's Exhibit 3). State's Exhibit 3 indicated that the victim was born on 15 September 2003, rendering her 12 years old when the alleged incidents occurred. Though not admitted for the purpose of establishing her age, Detective Doughty testified that the initial incident report also identified the victim's birth date as 15 September 2003. Detective Doughty opined that the victim "looked to be 10 or 11 years old" when he spoke with her on 1 December 2016. The photographs taken of the victim by Detective Doughty on the day of the interview were also admitted into evidence.

Defendant objected to the admission of the copy of the victim's Honduran birth certificate on authentication and hearsay grounds. After an extensive colloquy, the trial court overruled Defendant's objections and admitted State's Exhibit 3 into evidence. On appeal, Defendant reasserts both grounds for his objection and contends that the admission of State's Exhibit 3 constitutes reversible error. We consider each argument in turn.

a. Authentication

[2] Defendant first argues that the copy of the victim's Honduran birth certificate was not properly authenticated because (1) "the witness whom the State used to try and authenticate the document did not have

the requisite knowledge to authenticate it under Rule 901; and (2) the document was not self-authenticating under Rule 902(3)." We conclude that the document was properly authenticated.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Allen*, ___ N.C. App. ___, ___, 812 S.E.2d 192, 195, *disc. review denied*, 371 N.C. 449, 817 S.E.2d 202 (2018). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

"Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). While the Rules of Evidence provide a multitude of methods by which evidence may be properly authenticated, *see generally* N.C. Gen. Stat. § 8C-1, Rules 901(b), 902 (2017), the ultimate inquiry for the trial court is whether there exists "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* § 8C-1, Rule 901(a). Thus, "[i]t [is] not error for the trial court to admit . . . evidence if it could reasonably determine that there was sufficient evidence to support a finding that the matter in question is what its proponent claims." *State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011) (quotation marks omitted), *disc. review denied*, 365 N.C. 553, 722 S.E.2d 607 (2012).

The trial court's function "is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the [finder of fact] could reasonably find that the evidence is authentic." *State v. Ford*, 245 N.C. App. 510, 519, 782 S.E.2d 98, 105 (2016) (quotation marks omitted). "[A] *prima facie* showing, by direct or circumstantial evidence, . . . is enough." *State v. Mercer*, 89 N.C. App. 714, 716, 367 S.E.2d 9, 11 (1988). Once that threshold is met, it is for the factfinder to determine the appropriate weight and credibility that the evidence ought to be given. *Id.* Indeed, defendants are always "free to introduce any competent evidence relevant to the weight or credibility" of the evidence. *Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637.

Here, other than the fact that the birth certificate offered into evidence was not an original, there is nothing in the record to indicate that State's Exhibit 3 was forged or otherwise inauthentic. The document appears to bear the signature and seal of the Honduran Municipal Civil Registrar, and Ms. Vaughan testified that the school personnel "wouldn't

have made a copy [of the victim's birth certificate] unless we had the original." Moreover, Detective Doughty later testified that the incident report had "identified [the victim] as having a date of birth of September 15, 2003."[1] *See Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 587, 339 S.E.2d 799, 801 (1986) ("[I]t is not necessary that proof of the [authentication] be made before the introduction of the evidence . . . .").

We conclude that the combination of these circumstances sufficiently established the requisite *prima facie* showing to allow the trial court, as factfinder, to reasonably determine that State's Exhibit 3 was an authentic copy of the victim's Honduran birth certificate. Accordingly, Defendant's argument on this basis is overruled.

b. Hearsay

[3] Defendant also argues that State's Exhibit 3 "was inadmissible hearsay because it lacked sufficient 'trustworthiness' to satisfy Rule 803(8)." Again, we disagree.

"This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015), *disc. review denied*, 368 N.C. 686, 781 S.E.2d 606 (2016).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). "Hearsay is not admissible except as provided by statute . . . ." *Id.* § 8C-1, Rule 802. One such statutory exception is for "Public Records and Reports." *Id.* § 8C-1, Rule 803(8). Under this exception, a properly authenticated birth certificate is admissible "for purposes of proof of matters relevant to the information contained" therein. *State v. Joyner*, 295 N.C. 55, 62, 243 S.E.2d 367, 372 (1978); *see also* N.C. Gen. Stat. § 8C-1, Rule 803(8). However, the trial court may decline to admit such evidence if "the sources of information or other circumstances indicate [a] lack of trustworthiness." N.C. Gen. Stat. § 8C-1, Rule 803(8). "Guarantees of trustworthiness are based on a consideration of the totality of the circumstances[,] but only those that surround the making of the statement and that render the [statement] particularly worthy of belief." *State v. Little*, 191 N.C. App. 655, 666, 664 S.E.2d 432, 439, *disc. review denied*, 362 N.C. 685, 671 S.E.2d 326 (2008).

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1. Although Detective Doughty's testimony was not admitted for the purpose of establishing the victim's age, his statements nevertheless corroborate the authenticity of the birth certificate that was maintained in the victim's school file.

In the instant case, Defendant argues that "[t]here was simply no sound basis for determining that a photocopied document contained in a cumulative school file that was given to an unknown person by another unknown person established any measure of trustworthiness." However, as explained above, there are no circumstances in the instant case that would suggest that the birth date revealed on State's Exhibit 3 lacked trustworthiness. Moreover, there was additional evidence presented that supported the victim's age as provided in State's Exhibit 3, including the photographs that were taken of the victim at the time of her pregnancy, as well as Detective Doughty's testimony that the victim "looked to be 10 or 11 years old" at the time he interviewed her. In fact, in finding Defendant guilty of three counts of statutory rape of a child, the trial court stated: "I just can't—could not follow the defendant's argument given the fact that one, obviously, these photographs, this is a young child. I mean, this is not a 16 year old. This is not a child who has reached majority."

Under these circumstances, we conclude that the statement of the victim's birth date contained in State's Exhibit 3, which was properly authenticated, was sufficiently trustworthy, and was therefore admissible as a public record. Accordingly, the trial court did not err by admitting State's Exhibit 3 into evidence.

III. Satellite-Based Monitoring

[4] Lastly, Defendant argues that the trial court erred in ordering that he enroll in satellite-based monitoring for the remainder of his natural life upon his release from prison.

Defendant did not file written notice of appeal from the trial court's order enrolling him in satellite-based monitoring, as required by Rule 3 of our Rules of Appellate Procedure. *See State v. Dye*, ___ N.C. App. ___, ___, 802 S.E.2d 737, 741 (2017) ("This Court has interpreted [satellite-based monitoring] hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, a defendant must give written notice of appeal pursuant to N.C. R. App. P. 3(a), from a[] [satellite-based monitoring] proceeding." (quotation marks omitted)). Nevertheless, Defendant filed a petition for writ of certiorari asking this Court to review the trial court's conclusion that "Satellite Based Monitoring in this case is not an unreasonable search under law." Defendant argues that such a conclusion was erroneous "in the absence of any evidence from the State that lifetime [satellite-based monitoring] was a reasonable Fourth Amendment search." Indeed, the State presented no such evidence.

However, in addition to his failure to file written notice of appeal, Defendant made no argument before the trial court at his sentencing hearing that the satellite-based monitoring constituted an unreasonable Fourth Amendment search. Thus, because "constitutional errors not raised by objection at trial are deemed waived on appeal," *State v. Bursell*, ___ N.C. App. ___, ___, 813 S.E.2d 463, 465 (2017), Defendant essentially "asks this Court to take *two* extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear [his] appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018).

Defendant, however, directs our attention to N.C. Gen. Stat. § 15A-1446 and the line of cases standing for the proposition that "when a defendant asserts that a 'sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law,' appellate review of such errors may be obtained regardless of whether an objection was made at trial." *Dye*, ___ N.C. App. at ___, 802 S.E.2d at 742 (original alteration omitted) (quoting N.C. Gen. Stat. § 15A-1446(d)(18)); *see id.* at n.2 (noting also that "this Court has held, in a recent unpublished opinion, that N.C.G.S. § 15A-1446(d)(18) preserved a defendant's right to appeal a[] [satellite-based monitoring] order when the defendant failed to object at the [satellite-based monitoring] hearing" (citing *State v. Egan*, 245 N.C. App. 567, 782 S.E.2d 580 (2016) (unpublished))). In other words, although satellite-based monitoring is a "civil, regulatory scheme," *State v. Hunt*, 221 N.C. App. 48, 56, 727 S.E.2d 584, 590, *disc. review denied*, 366 N.C. 390, 732 S.E.2d 581 (2012), rather than a "criminal punishment," *id.* at 57, 727 S.E.2d at 591, Defendant appears to suggest that his constitutional challenge thereto is nonetheless preserved by virtue of the error having occurred at his sentencing hearing. Thus, according to Defendant, this Court need only grant certiorari; his Fourth Amendment challenge is automatically preserved.

Defendant's argument is unavailing. This Court is bound by the precedent of our Supreme Court, which quite broadly and plainly has held:

> Although [a] defendant's nonconstitutional sentencing issues are preserved without contemporaneous objection . . . , constitutional issues are not. . . . This is true even when a sentencing issue is intertwined with a constitutional issue. [If a] defendant failed to argue to the sentencing court that the sentence imposed violates the [United

> States Constitution], she may not raise that argument on appeal.

State v. Meadows, ___ N.C. ___, ___, 821 S.E.2d 402, 407 (2018) (internal citations omitted); *see also State v. Grady*, ___ N.C. App. ___, ___, 817 S.E.2d 18, 23 (2018) ("[A] defendant's Fourth Amendment [satellite-based monitoring] challenge must be properly asserted at the hearing in order to preserve the issue for appeal."). Accordingly, this Court cannot review Defendant's Fourth Amendment argument without invoking Rule 2.

We emphasize that this Court "must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because 'inconsistent application' of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 370 (quoting *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007)). Here, because Defendant is no different from other defendants who failed to preserve a Fourth Amendment challenge to their enrollment in satellite-based monitoring below, we decline to invoke Rule 2. *See*, *e.g.*, *State v. Cozart*, ___ N.C. App. ___, 817 S.E.2d 599 (2018); *Bishop*, ___ N.C. App. ___, 805 S.E.2d 367. Consequently, we deny Defendant's petition for writ of certiorari. *See State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) ("A petition for the writ must show merit . . . ."), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960); *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 370.

Conclusion

Because there is substantial independent evidence tending to establish the trustworthiness of Defendant's extrajudicial confession to three counts of statutory rape of a child, the *corpus delicti* rule is satisfied, and we affirm the trial court's denial of Defendant's motion to dismiss. Furthermore, the trial court did not err in admitting into evidence the purported copy of the victim's Honduran birth certificate. Accordingly, we affirm the trial court's judgment entered upon Defendant's convictions for three counts of statutory rape of a child. We deny Defendant's petition for writ of certiorari and dismiss his appeal from the trial court's order enrolling him in satellite-based monitoring.

AFFIRMED IN PART; DISMISSED IN PART.

Judge HAMPSON concurs.

Judge BERGER concurs in result only.

STATE OF NORTH CAROLINA
v.
MARK EDWIN JONES

No. COA18-508

Filed 7 May 2019

1. Pretrial Proceedings—criminal prosecution—trial calendar—section 7A-49.4—notice requirement—prejudice analysis

Defendant failed to demonstrate he was prejudiced by the State's failure to publish the trial calendar ten days prior to trial as required by N.C.G.S. § 7A-49.4(e) where the trial was scheduled months in advance and then continued multiple times, giving defendant adequate notice to prepare. Further, defendant's assertion that he could have called certain witnesses who would have given favorable testimony was speculative and did not constitute a showing that the outcome of the trial would have been different had he been given the statutory notice.

2. Evidence—rebuttal witness—denial of request—abuse of discretion analysis

The trial court did not abuse its discretion in denying defendant's request to add his father as a rebuttal witness in a prosecution for sex offenses where defendant was permitted to present other evidence to rebut unexpected testimony of the victim and her mother, and the court's determination that the requested rebuttal testimony would be repetitive and of limited relevance was not manifestly unreasonable.

Appeal by defendant from judgments entered 26 July 2017 by Judge Martin B. McGee in Cherokee County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Mark Hayes for defendant.

DIETZ, Judge.

Defendant Mark Edwin Jones appeals his convictions for first degree sexual offense and taking indecent liberties with a child. Jones

argues that the trial court erred by denying his motion for a continuance because the district attorney did not file an adequate trial calendar ten or more days before trial, in violation of N.C. Gen. Stat. § 7A-49.4(e). Jones also argues that the trial court erred in denying his request to present a rebuttal witness to respond to testimony from the State's witnesses.

As explained below, because the case was scheduled for trial many months in advance and then continued several times, even assuming the trial calendar submitted by the district attorney was inadequate under N.C. Gen. Stat. § 7A-49.4(e), Jones must establish that he was prejudiced by the failure to receive sufficient notice. He has not done so here.

With respect to the rebuttal witness, that decision is one left to the trial court's discretion and, because the trial court permitted other testimony that established the same facts Jones sought from his rebuttal witness, Jones has not shown that the trial court's decision was so manifestly arbitrary that it could not have been the result of a reasoned decision. We therefore find no prejudicial error in the trial court's judgment.

Facts and Procedural History

On 4 April 2013, Defendant Mark Jones went to work at 8:00 a.m. Jones's wife, Betty, stayed at home with their youngest child. At 9:15 a.m., Betty's sister dropped off her two children, Millie and Collin,[1] for Betty to babysit. Betty watched the children from 9:15 a.m. until she had to leave to drive her afternoon school bus route sometime between 2:30 and 2:45 p.m. After Betty left, the children were alone with Jones for a short period of time before Millie and Collin's mother arrived to pick them up around 2:45 p.m.

When Millie's mother picked her up, Millie was upset. Later that evening, Millie began crying. When her mother asked her what was wrong, Millie indicated that Jones had removed her underwear and touched her private area, put his finger in her "hole," and showed her his penis. Millie's parents contacted the police to report the incident.

On 8 April 2013, Millie went to a regularly scheduled appointment with a counselor who treated her for anxiety. The counselor observed that Millie was upset and asked Millie if she wanted to talk. Millie told the counselor that Jones had pulled her pants down and "stuck his finger in her hole and that it hurt."

On 10 June 2013, Jones was indicted for taking indecent liberties with a child and first degree sexual offense with a child by an adult. The

1. We use pseudonyms to protect the juveniles' identities.

case went to trial on 25 July 2017. Jones moved to continue the trial, arguing that he received insufficient notice of the trial date under N.C. Gen. Stat. § 7A-49.4(e) and that he did not have time to contact or subpoena certain witnesses. After hearing arguments, the trial court ruled that "in my discretion I'm going to deny the request to continue."

At trial, Betty testified that she typically left for her afternoon bus route at 2:30 p.m., but that on 4 April 2013, she left closer to 2:45 p.m. because her sister had not yet arrived to pick up her kids. Jones testified that, after Betty left, he played guitar for the children while sitting on his bed. He stated that he only played about one song before Millie's mother arrived. Jones testified that Millie was upset because she wanted one of Jones's guitar picks. He denied ever being alone with Millie or touching her.

Millie testified that she went into Jones's bedroom and was alone with him. She testified that Jones removed her pants and underwear and touched her "privates on the inside" and outside with his finger. Millie's mother testified about what Millie reported to her. She explained that Millie, who had a speech impediment, had clarified that she was talking about Jones's "dick," not his guitar pick.

At the close of the State's case, Jones requested to add his father as a rebuttal witness to testify that Jones was at work at the time Millie arrived at his home the morning of the alleged crime. Jones argued that this rebuttal testimony was necessary because Millie and her mother both had unexpectedly testified that Jones was home (rather than away at work) at that time. The trial court denied the request.

On 26 July 2017, the jury convicted Jones of both charges. The trial court sentenced him to 300 to 420 months in prison for first degree sexual offense and 16 to 29 months in prison for indecent liberties. Jones also was ordered to enroll in lifetime satellite-based monitoring and to register as a sex offender for life. Jones timely appealed.

Analysis

I. Denial of Motion for Continuance

[1] Jones first argues that the trial court erred in denying his motion for a continuance because his counsel was not given sufficient notice of trial in violation of N.C. Gen. Stat. § 7A-49.4(e). As explained below, we reject this argument because Jones has not shown that he was prejudiced by the trial court's error.

Section 7A-49.4 provides that "[c]riminal cases in superior court shall be calendared by the district attorney at administrative settings according to a criminal case docketing plan" which "shall, at a minimum, comply with the provisions of this section." N.C. Gen. Stat. § 7A-49.4(a). Subsection (e) of the statute requires that "[n]o less than 10 working days before cases are calendared for trial, the district attorney shall publish the trial calendar." *Id.* § 7A-49.4(e). This "trial calendar" is required to "schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial." *Id.*

In his motion for continuance, Jones argued that he did not receive the minimum "10 working days" notice of trial required by the statute. In July 2016, the trial court entered an order setting the case for trial on 14 November 2016 but the trial was continued—apparently several times, from trial terms in November 2016, January 2017, April 2017, and June 2017, until the eventual 24 July 2017 trial date. The case also was placed on what the State calls a "trial session calendar" more than 10 days before the trial, but that calendar, titled "Superior/Criminal – Trial Matters" included more than a dozen criminal cases set for trial on 24 July 2017, all listed in alphabetical order by the defendants' last names. Jones contends that this calendar does not comply with section 7A-49.4(e) because it does not list cases "in the order in which the district attorney anticipates they will be called for trial" and, given the number of complicated criminal cases on the list, necessarily includes "cases that the district attorney does not reasonably expect to be called for trial" that day. *Id.*

Instead, Jones asserts that the "true trial calendar" necessary under section 7A-49.4(e) was a document filed 11 July 2017 and emailed to Jones's counsel on 12 July 2017. That document, titled "Trial Order the Prosecutor Anticipates Cases to be Called," listed Jones's case as the first case for trial on 24 July 2017. Jones contends that this trial order, because it identifies the cases actually to be tried on 24 July 2017 and lists them in the order in which they will be called for trial, is the "trial calendar" required by section 7A-49.4(e). And, Jones contends, he did not receive the necessary 10 days' notice of this calendar before trial, thus entitling him to a continuance.

We agree with Jones that the trial order entered 11 July 2017 is the only "trial calendar" that complies with N.C. Gen. Stat. § 7A-49.4(e), and it was not published 10 or more days before the trial date. But, as explained below, Jones has not shown that he was prejudiced by the

failure to receive the full 10-day notice and we therefore find no prejudicial error.

Jones first contends that he is not required to show prejudice because a defendant's right to 10-day notice of trial under N.C. Gen. Stat. § 7A-49.4(e) is analogous to the right to a week-long notice period between arraignment and trial under N.C. Gen. Stat. § 15A-943, which states that a defendant "may not be tried without his consent in the week in which he is arraigned." Our Supreme Court has held that a violation of this notice period between arraignment and trial is presumed prejudicial. *See State v. Shook*, 293 N.C. 315, 319, 237 S.E.2d 843, 847 (1977).

But there are key distinctions between the week-long notice period in section 15A-943 and the 10-day notice period in section 7A-49.4(e). First, the language in section 15A-943(b) provides that a defendant "may not be tried *without his consent* in the week in which he is arraigned." (Emphasis added). Our Supreme Court held that this language "vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used." *Shook*, 293 N.C. at 319, 237 S.E.2d at 846–47. The Court reasoned that "[t]o require a defendant to show prejudice when asserting the violation of this statutory right which he has insisted upon at trial would be manifestly contrary to the intent of the legislature." *Id.* at 319, 237 S.E.2d at 847. Here, by contrast, the requirements in section 7A-49.4(e) for setting and publishing the trial calendar do not expressly vest any rights in the defendant. And, notably, other provisions in section 7A-49.4, such as subsection (f) governing the order of cases called for trial, expressly vest rights in the defendant in the same manner as section 15A-943.

In addition, the circumstances of this case highlight why a prejudice analysis is appropriate here, while inappropriate for the week-long notice period between arraignment and trial. During the week of arraignment, the defendant has only just announced the decision to plead not guilty and proceed to trial. The week-long notice period thus provides a minimum amount of time that the defendant will be permitted to prepare following the decision to go to trial. By contrast, the trial calendar often comes long after the defendant has made the decision to plead not guilty and go to trial; it is intended to provide time for the defendant to secure witnesses and take other steps that may be necessary once a specific trial date is set. Because the defendant may already have had ample time to prepare for trial, and because the nature of the case may mean the defendant did not need more time to prepare, it is appropriate to ask whether the lack of the minimum 10-day notice period actually prejudiced the defendant.

Here, for example, on 12 July 2016—more than a year before the trial in this case—the trial court entered an order stating that "the trial of this matter is hereby scheduled for November 14, 2016, subject to further motions for orders continuing this matter as may be agreed upon by the State and Defendant or ordered by the Court." The trial date was continued from that "November term" for nearly six months, although the record does not indicate whether those continuances were done by agreement of the parties or by order of the Court.

In any event, Jones certainly knew for months that his case would soon be called for trial, and thus knew he should prepare. In this context, it does not appear "manifestly contrary to the intent of the legislature" to require a showing of prejudice; to the contrary, this appears to be the sort of circumstance in which our legislature would expect a showing of prejudice before finding the violation amounted to reversible error compelling a new trial. *See* N.C. Gen. Stat. § 15A-1443(a); *State v. Phachoumphone*, __ N.C. App. __, __, 810 S.E.2d 748, 752 (2018); *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 241 (2006). Accordingly, we hold that a violation of N.C. Gen. Stat. § 7A-49.4(e) is reversible error only upon a showing of prejudice to the defendant.

Jones also contends that, even if he must show prejudice, he has done so because he would have been able to contact and subpoena additional witnesses if he was allowed more time to prepare for trial. Specifically, Jones argues that he would have been able to make contact with the physician who performed the physical exam of Millie and with the person who performed the forensic interview of Millie.

But it is not enough to simply assert that there were witnesses Jones might have contacted if given more time. To show prejudice, a defendant asserting a violation of N.C. Gen. Stat. § 7A-49.4(e) must show that, had that statutory provision not been violated, there is a reasonable possibility that the outcome of the trial would have been different. N.C. Gen. Stat. § 15A-1443(a). This, in turn, means that the defendant must explain what testimony or evidence would have been admitted had the continuance been granted. In other words, as our Supreme Court has explained, the defendant must show what he "expected to attempt to prove through these witnesses" that would affect the jury's determination of guilt. *State v. Branch*, 306 N.C. 101, 105, 291 S.E.2d 653, 657 (1982). Without that evidence, an appellate court cannot assess prejudice because "we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record." *Id.*

Jones argues that, with more time, he might have been able to call as witnesses the physician who examined Millie and the investigator

who conducted a "forensic interview" with Millie. Jones argues that these witnesses could have established "how much [Millie's] story had changed over time, how much the story was coached out of the child, and whether the interviewer had already heard a version of the story from another adult." But this is all speculation. Jones has not shown that these witnesses would have offered the sort of testimony he imagines. Likewise, he has not asserted that the trial court denied him the opportunity to make an offer of proof or build a record of what testimony these witnesses actually would have provided—although there has been ample time to do so since the trial court's ruling denying the request for a continuance. Because Jones has not shown what testimony these witnesses would provide that might have impacted the outcome of the trial, we cannot conclude that Jones was prejudiced by the trial court's decision not to continue it. We thus find no prejudicial error.[2]

II. Denial of Request for Rebuttal Witness

[2] Jones also argues that the trial court erred in denying his request to add his father as a rebuttal witness to rebut evidence presented by the State indicating that Jones was at home on the morning of 4 April 2013 when Millie was dropped off. We disagree.

"Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). A trial court's decision on whether to admit rebuttal evidence will not be overturned "absent a showing of gross abuse of discretion." *State v. Anthony*, 354 N.C. 372, 421, 555 S.E.2d 557, 588 (2001). "In determining relevant rebuttal evidence, we grant the trial court great deference and we do not disturb its rulings absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 338, 626 S.E.2d 716, 724 (2006) (citations omitted). Additionally, "[e]videntiary

2. Jones also argues that the State refused to turn over "the prosecution's notes from its interviews with Millie." But the trial transcript indicates that the State declined to produce those notes not because Jones had not asked for them in time, but because the State determined that, in those interviews, Millie did not "make any additional disclosures or make any statements that would be materially different than what has already been included in discovery." In other words, the State did not intend to turn over those notes even if the trial court continued the trial. If Jones believes the State improperly withheld those notes, and this was error, that is a separate argument from the one Jones asserts in this appeal. N.C. R. App. P. 28(b)(6).

errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

After Millie and her mother unexpectedly gave testimony indicating that Jones was at home when Millie's mother dropped her off on the morning of 4 April 2013, Jones requested to present rebuttal testimony from his father, who would have testified that Jones was at work with him at the time Millie was dropped off. The trial court denied that request. But the Court permitted Jones to present other evidence rebutting that testimony, including testimony from both Jones and his wife. More importantly, no party disputes that, whether or not Jones was at home that morning with Millie, he was home alone with the children (at least for a short time) in the afternoon. The State contends that it was during this time, not in the morning, that the crimes occurred. Thus, the trial court reasonably determined that the requested rebuttal testimony was repetitive and of limited relevance to the issues at trial. *See State v. Reid*, 204 N.C. App. 122, 126, 693 S.E.2d 227, 231 (2010); *State v. Robinson*, 355 N.C. 320, 333–34, 561 S.E.2d 245, 254 (2002). Because this decision was not manifestly arbitrary and unreasonable, it was within the trial court's discretion and we cannot disturb it on appeal. *Anthony*, 354 N.C. at 421, 555 S.E.2d at 588.

Conclusion

For the reasons discussed above, we find no prejudicial error in part and no error in part in the trial court's judgments.

NO PREJUDICIAL ERROR IN PART; No ERROR IN PART.

Judges BRYANT and ARROWOOD concur.

STATE v. MASSEY

[265 N.C. App. 301 (2019)]

STATE OF NORTH CAROLINA
v.
DAMON MARIO MASSEY

No. COA18-1161

Filed 7 May 2019

Kidnapping—first-degree—with use or display of a firearm—victim not released in safe place

The State presented substantial evidence for the jury to convict defendant of first-degree kidnapping based on failure to release the victim in a safe place, where defendant forced the victim (a car mechanic) at gunpoint to examine defendant's truck, defendant shot the gun at the ground near the victim's feet, and then turned and fired another shot in the air, giving the victim time to escape. The evidence did not support an inference that defendant affirmatively took action to release the victim, nor that he allowed the victim to leave.

Appeal by defendant from judgment entered 17 May 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Cathy Hinton Pope, for the State.

Mark L. Hayes for defendant-appellant.

TYSON, Judge.

Damon Mario Massey ("Defendant") appeals from a judgment entered after a jury found him guilty of first-degree kidnapping. We find no error.

I. Background

Jaz Automotive is a used car dealership and auto repair shop located in Charlotte. Approximately two weeks before the kidnapping at issue occurred on 26 October 2015, Defendant brought his white Chevrolet 3500 pickup truck to Jaz Automotive to have his power steering repaired. Shawn Kinard was one of the mechanics who worked on Defendant's truck. Kinard and mechanics replaced the power steering pump in the

truck. Defendant's truck was operating normally when he picked it up from Jaz.

Defendant returned to Jaz Automotive with a tow truck towing his pickup truck on Saturday, 24 October 2015. Defendant told Kinard his pickup truck would not start. Kinard testified, in part: "[Defendant] was insinuating as if it was something we had [done] when we replaced the power steering pump." Kinard asked Defendant to return on Monday to speak to one of the owners of Jaz Automotive.

Defendant returned to Jaz Automotive the following Monday, 26 October 2015. Defendant had his truck towed to the front of Jaz's parking lot. Defendant entered the offices of Jaz Automotive and began speaking with Grady Lockhart ("Lockhart"), one of Jaz's owners. During this time, Kinard was working on another vehicle in the back part of Jaz's parking lot, away from where Defendant's truck was parked. Lockhart accompanied Defendant to speak with Kinard about the pickup truck.

After Defendant spoke with Kinard about the pickup truck, Kinard told him to "give me a few minutes" and "I'll see what I can do." Defendant returned to his truck while Kinard continued working on another customer's vehicle.

A short time later, Kinard looked up and saw Defendant walking towards him wearing a tactical vest and carrying a shotgun. Lockhart observed Defendant was carrying a shotgun and walking towards Kinard. Lockhart called 911. Kinard testified "[Defendant] walked up on me and he clicked the shotgun and he asked me, 'Do you have time to look at my truck now?' And so I proceeded to put my hands up and say, 'Let's go look at your truck.' " Kinard walked to the front of the lot where Defendant's picktup truck was parked, while Defendant pointed his shotgun at Kinard's back.

Defendant told Kinard "If you make any sudden moves . . . I'll put a bullet in your back right here." Kinard looked into the engine bay of Defendant's pickup truck, while Defendant pointed the shotgun at him. Defendant fired a shot at the ground, close to Kinard's feet. Defendant pumped the shotgun again, turned his back to Kinard and fired a shot into the air.

While Defendant was turned away from him, Kinard ran out of the lot to a gas station located down the road and called 911. Defendant did not tell Kinard he was free to leave.

Charlotte-Mecklenburg Police Sergeant Bryan Crum ("Sergeant Crum") was the first law enforcement officer to arrive on the scene.

Sergeant Crum parked his vehicle a short distance from Jaz Automotive. Sergeant Crum observed "a guy walking through the parking lot carrying a shotgun, had a hat on and he was smoking a cigarette." Sergeant Crum later identified this person as Defendant. Sergeant Crum drew his firearm and ordered Defendant to put the shotgun down. Defendant placed the shotgun in the back seat of his pickup truck and was arrested. Sergeant Crum observed a gunshot mark in the asphalt pavement in front of Defendant's pickup truck. Police recovered the shotgun Defendant had wielded along with the tactical vest Defendant had been observed wearing. A sheathed machete was present on the back portion of the tactical vest.

Defendant was charged with second-degree kidnapping, assault with a deadly weapon, assault by pointing a gun, discharging a firearm within a city limit, and first-degree kidnapping with the use or display of a firearm. Prior to trial, the State dismissed all charges except for first-degree kidnapping with a firearm.

The State presented the testimony of Kinard, Lockhart, Sergeant Crum, and a 911 dispatcher. Defendant did not present any evidence. At the close of the evidence, Defendant made a motion to dismiss the charge of first-degree kidnapping, in part, for insufficient evidence that he had not released Kinard in a safe place. The trial court denied Defendant's motion to dismiss.

The trial court submitted first-degree kidnapping to the jury, as well as the lesser-included offenses of second-degree kidnapping and false imprisonment. Following deliberation, the jury found Defendant guilty of first-degree kidnapping with the use or display of a firearm in a separate verdict. The trial court imposed an active presumptive term of 58 to 82 months for first-degree kidnapping. The minimum term of 58 months was increased to 72 months by the sentence enhancement provided by N.C. Gen. Stat. § 15A-1340.16A(c)(1) (2017) for Defendant's use or display of a firearm. Defendant was sentenced, in total, to an active term of 130 to 168 months. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdicts pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issue

Defendant argues the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping. Defendant contends the

State failed to present substantial evidence he did not release Kinard into a safe place. We disagree.

IV. Standard of Review

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Id.* (citations omitted).

"When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (citations omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

V. Analysis

"First-degree kidnapping is the unlawful confinement, restraint or removal from one place to another, of any other person 16 years of age or over without the consent of such person for the purpose of facilitating the commission of any felony or facilitating flight of any person following the commission of a felony." *State v. Ly*, 189 N.C. App. 422, 427, 658 S.E.2d 300, 304 (2008) (citation omitted).

Defendant does not dispute the State's evidence was sufficient to show he had kidnapped Kinard. Instead, Defendant challenges the sufficiency of the evidence to show first-degree, as opposed to second-degree, kidnapping. Second-degree kidnapping is elevated to first-degree kidnapping if the victim was not released in a safe place, was seriously injured, or was sexually assaulted. N.C. Gen. Stat. § 14-39(b) (2017). Defendant's indictment for first-degree kidnapping alleged Kinard was not released in a safe place. The State acknowledges in its brief no evidence tends to show Defendant injured or sexually assaulted Kinard.

"[T]he General Assembly has neither [statutorily] defined nor given guidance as to the meaning of the term 'safe place' in relation to the offense of first degree kidnapping." *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003). "Further, the cases that have focused

on whether or not the release of a victim was in a safe place have been decided . . . on a case-by-case approach, relying on the particular facts of each case." *Id.* at 280, 579 S.E.2d at 129 (citations omitted).

The Supreme Court of North Carolina has held that releasing a victim in a safe place "implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983). " '[R]elease' [in a safe place] inherently contemplates an affirmative or willful action on the part of a defendant." *State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242 (2006).

"Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place." *Ly*, 189 N.C. App. at 428, 658 S.E.2d at 305 (citing *Love*, 177 N.C. App. at 625, 630 S.E.2d at 242).

Defendant asserts he had "released" Kinard because he turned his back to him and fired a shot into the air. Defendant contends he affirmatively and voluntarily released Kinard because he did not "detain . . . Kinard with any restraints or confine him in a locked location" and he "voluntarily turned his back and allowed . . . Kinard to run away."

Defendant cites this Court's opinion in *State v. Leak*, 174 N.C. App. 628, 621 S.E.2d 341, 2005 WL 3046527 (2005) (unpublished), to support his argument Kinard was released in a safe place. In *Leak*, two individuals robbed a Wendy's restaurant at gunpoint. *Leak*, 2005 WL 3046527, at *1. During the robbery, the robbers forced three Wendy's employees to enter a walk-in freezer. *Id.* The defendant was one of the robbers, and he was charged, in part, with two counts of first-degree kidnapping. *Id.* At trial, the defendant filed a motion to dismiss the charges of first-degree kidnapping based upon a lack of sufficient evidence that he did not release the victims in a safe place. *Id.* at *2. The trial court denied the motion to dismiss. *Id.*

On appeal, this Court held all the evidence showed the victims were released in a safe place, because:

> Here, the victims were released at the place where they worked. The freezer could be opened from the inside and the employees walked out of the freezer on their own with-in minutes after ensuring the perpetrators had left the building. They awaited the arrival of the police, who had been called by the store manager.

Id. at *4.

The facts in *Leak* are clearly distinguishable from the State's evidence presented here. Defendant did not leave Kinard behind at the scene of the kidnapping. Instead, Kinard ran away when he saw he had an opportunity to do so. Viewed in the light most favorable to the State, a reasonable juror could find Kinard ran away to escape and that Defendant did not release him.

Defendant also cites this Court's opinion in *State v. White*, 127 N.C. App. 565, 492 S.E.2d 48 (1997), to support his argument. In *White*, the defendant and an accomplice abducted the victim and agreed to release the victim "if she agreed to tell authorities she had not seen her assailants." *White*, 127 N.C. App. at 568, 492 S.E.2d at 50. The defendant and his accomplice drove the victim to a motel and dropped her off at the motel parking lot in the middle of the afternoon. *Id.* The abductors also gave the victim change so she could use a pay phone. *Id.*

This Court held "all the evidence established that the victim was released in a safe place." *Id.* at 573, 492 S.E.2d at 53. In *White*, there was no evidence to indicate the victim had escaped, in contrast to the instant case. *See id.* The evidence in *White* indisputably showed her captors released her. *Id.* The issue in *White* was whether the victim was released *in a safe place* at a motel parking lot, not whether she was released at all. *Id.*

Viewed in the light most favorable to the State, the evidence does not show Defendant "relinquished dominion and control over" Kinard to "effectuate [his] release in a safe place." *See Ly*, 189 N.C. App. at 428, 658 S.E.2d at 305.

Defendant held Kinard at gunpoint and threatened to shoot him in the back if Kinard did not repair his truck. While Kinard was looking at the engine bay of Defendant's pickup truck, Defendant fired a shot into the asphalt close to Kinard's feet. Defendant then turned his back to Kinard, pumped another shell into the chamber, and fired a second shot into the air. When Defendant turned away, Kinard seized the opportunity to run away. Defendant never told or indicated to Kinard that he was free to leave, nor gave any indication that he would not shoot Kinard if he ran away.

The mere act of an armed kidnapper turning his back, without more, is not "a conscious, willful action on the part of the [kidnapper] to assure that his victim is released in a place of safety." *See Jerrett*, 309 N.C. at 262, 307 S.E.2d at 351. Kinard's seizing of the opportunity to flee from Defendant is not "an affirmative or willful action on the part

of [Defendant]," to release Kinard. *See Love*, 177 N.C. App. at 625, 630 S.E.2d at 242.

Although Defendant did not pursue Kinard or fire another shot at him as he ran away, this failure to pursue or attempt to re-establish control does not convert Kinard's escape into a release in a safe place to support dismissal of the first-degree kidnapping charge. *See State v. Cole*, 199 N.C. App. 151, 159, 681 S.E.2d 423, 429 (2009) ("[Defendant's] failure to chase or do any additional harm to [victim] does not convert her escape into a release"), *writ denied*, *review denied*, 363 N.C. 658, 686 S.E.2d 679 (2009).

In *Jerrett*, our Supreme Court noted the dichotomy which exists between a voluntary *release* of a victim by a defendant and an *escape* by a victim:

> [I]t is difficult to envision a situation when a release of the victim by the defendant could be other than voluntary. It seems the defendant would either release the victim voluntarily, or the victim would reach a place of safety by effecting an escape or by being rescued.

309 N.C. at 262, 307 S.E.2d at 351 (emphasis omitted). The defendant in *Jerrett* kidnapped his victim at gunpoint and forced her to drive him in her car. *Id.* at 263, 307 S.E.2d at 352. When the victim indicated the car was low on gas, the defendant permitted her to stop at a gas station. *Id*. The defendant allowed the victim to go inside the gas station, while he followed several feet behind her and carried his pistol underneath his shirt within his waistband. *Id*.

The victim walked past a police officer, who was inside the gas station, and told the officer in a low voice that the defendant had a gun. *Id*. The victim walked to the back of the gas station and locked herself inside a storage room. *Id*. The defendant did not attempt to stop the victim while they were both inside of the gas station. *Id*. The officer confronted and arrested the defendant. *Id*.

Our Supreme Court held that the evidence was sufficient to submit the theory of first-degree kidnapping to the jury, and stated:

> Although this evidence presents a close question as to whether defendant released [the victim] in a safe place, we are of the opinion that it was sufficient to permit the jury to reasonably infer that [victim] escaped or that she was rescued by the presence and intervention of the police officer. Conversely, this evidence would have permitted

> the jury to reasonably infer that defendant released [the victim] in a safe place. It was for the jury to resolve the conflicting inferences arising from this evidence.

Id.

As in *Jerrett*, the evidence presented here was sufficient to permit the jury to reasonably find that Kinard escaped when Defendant turned his attention away from Kinard. *See id.* Viewed in the light most favorable to the State, substantial evidence supports the jury's conclusion that Defendant did not release Kinard in a safe place to convict him of first-degree kidnapping.

The trial court instructed the jury on first-degree kidnapping, and the lesser-included offences of second-degree kidnapping and false imprisonment. After being properly instructed, the jury weighed and resolved conflicts in the evidence to reach its verdict. Defendant has failed to show the trial court erred by denying his motion to dismiss. Defendant's arguments are overruled.

VI. Conclusion

Viewed in the light most favorable to the State, sufficient evidence was admitted to submit the charge of first-degree kidnapping to the jury. The trial court also submitted the lesser-included offenses of second-degree kidnapping and false imprisonment for the jury to weigh the evidence. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the trial court's denial of Defendant's motion to dismiss, the jury's verdicts, or the judgment entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge McGEE and Judge BERGER concur.

STATE OF NORTH CAROLINA
v.
ANTON THURMAN McALLISTER

No. COA18-726

Filed 7 May 2019

Constitutional Law—effective assistance of counsel—admission of client's guilt—acknowledgment that defendant injured victim—no deficiency

Defense counsel's representation was not deficient under *State v. Harbison*, 315 N.C. 175 (1985), where counsel did not concede defendant's guilt to one of the crimes charged—assault on a female—but rather acknowledged that defendant had injured the victim. Counsel did not state that defendant had assaulted, struck, pushed, bit, or committed any of the acts alleged by the State; and counsel did not acknowledge any elements of habitual misdemeanor assault, for which assault on a female was the underlying offense.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 22 August 2016 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 13 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Anton Thurman McAllister ("Defendant") appeals by petition for writ of certiorari from a judgment entered after a jury's conviction of one count of habitual misdemeanor assault. We find no error.

I. Background

Defendant met the victim, Stephanie Leonard, at a drug treatment facility group session in Winston-Salem. Soon after they met, Defendant moved into Ms. Leonard's apartment.

On the evening of 16 February 2015, Defendant and Ms. Leonard jointly consumed a large bottle of wine at a table inside Ms. Leonard's apartment. Around 9:00 p.m., they decided to walk to a nearby BP gas station to purchase cigarettes. Before arriving at the BP gas station, Ms. Leonard decided she wanted more wine and the pair began walking towards another store.

At this point, Defendant realized Ms. Leonard had not disclosed to him that she had money. Ms. Leonard testified that Defendant hit her in the face and knocked her to the ground, causing her to lose her wallet in the fall. Ms. Leonard got up and began to walk back towards the BP station. Defendant continued to strike her in the face. A cashier at the BP heard the struggle and saw Defendant "jerk" Ms. Leonard around outside of the store. The cashier called the police. Winston-Salem police responded to the call, but did not find Defendant or Ms. Leonard. An officer recovered Ms. Leonard's wallet and identification card at the scene.

The couple eventually returned to Ms. Leonard's apartment. Ms. Leonard testified that her face was bleeding and Defendant continued to hit her and drag her around the apartment. During the struggle, as Ms. Leonard struck at Defendant, her fingers entered his mouth and his fingers entered hers. Ms. Leonard testified that she bit Defendant's fingers and he bit her fingers back. At some point during the altercation, Ms. Leonard got into the bathtub. Defendant washed blood off of her body and splashed the blood-water mixture onto the walls.

Ms. Leonard went into her bedroom. Defendant attempted to force Ms. Leonard to perform fellatio. Defendant and Ms. Leonard then engaged in sexual intercourse and both fell asleep.

The next day, 17 February, Winston-Salem police arrived at the BP station to meet Ms. Leonard and investigate the assault. Officer P.M. Felske testified he observed Ms. Leonard's "cut lip and swollen lip and that it appeared that she had been assaulted." Law enforcement officers also entered and examined Ms. Leonard's apartment. Officer Christopher Ingram observed and photographed Ms. Leonard's injuries and the blood stains the officers had observed in the apartment, on the floor of the bathroom and walls of the bathtub.

Officer J.A. Henry collected a security video recorded at the BP station on 16 February and observed Defendant present in the area of that same BP on the evening of 17 February. Defendant agreed to go to the police department to speak with officers about an unrelated incident. At the police station, Defendant agreed to discuss the incident between

himself and Ms. Leonard. Defendant purportedly admitted he had pushed Ms. Leonard and engaged in other physical contact.

Defendant was indicted for habitual misdemeanor assault and charges of second-degree rape, second-degree sex offense, and assault by strangulation.

On 22 August 2016, the jury returned verdicts finding Defendant guilty of assault on a female, the underlying felony for habitual misdemeanor assault, and not guilty of all the other offenses. Defendant admitted to the predicate misdemeanor assault convictions for habitual misdemeanor assault. The trial court entered judgment sentencing Defendant to a term of 15 to 27 months imprisonment for habitual misdemeanor assault.

Defendant failed to file a notice of appeal. On 19 July 2017, Defendant filed a *pro se* "Motion to Modify and Terminate Sentence for Ineffective Assistance of Counsel." The trial court treated Defendant's motion as a motion for appropriate relief ("MAR") and denied the motion without an evidentiary hearing.

Defendant filed a petition for writ of certiorari with this Court on 11 August 2017. By order entered 29 August 2017, this Court allowed the petition "for the purpose of reviewing the judgment entered . . . on 22 August 2016."

On 17 October 2018, Defendant filed an appellate brief, and at the same time filed a second petition for writ of certiorari seeking review of the trial court's 27 July 2017 order denying the MAR. The second petition was referred to this panel for consideration.

II. Jurisdiction

This Court reviews Defendant's criminal conviction by writ of certiorari granted on 29 August 2017 pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) (2017).

III. Issue

Defendant asserts his counsel conceded his guilt to the offense of habitual misdemeanor assault on a female which constitutes a *per se* denial of his constitutional right to effective assistance of counsel.

IV. Standard of Review

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

V. *State v. Harbison*

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), our Supreme Court held that where "counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." The Court stated the practical effect is the same as if defense "counsel had entered a plea of guilty without the client's consent." *Id.*

Our Supreme Court in *Harbison* requires a defendant's consent to be on the record to allow his counsel's concession of defendant's guilt of one or more of the offenses for which he is charged. An "ineffective assistance of counsel, per se in violation of the Sixth Amendment, [is] established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08.

Defendant argues his trial counsel admitted or conceded his guilt on the misdemeanor charge of assault on a female without his consent and asserts he is entitled to a new trial. The State argues that no *Harbison* violation occurred because counsel did not expressly concede Defendant's guilt to a charged crime or only admitted one element of a charged offense.

The facts and statements of the present case fall squarely within the rationale of the precedents cited by the State from the Supreme Court of North Carolina and our Court, where Defendant's counsel may have admitted an element of the offense, but he did not expressly concede the crime charged or all other elements of the charged crime.

A. State v. Gainey

In *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002), our Supreme Court rejected the defendant's assignment of error asserting his counsel's argument violated *Harbison*. The Court recognized that "defense counsel never conceded that defendant was guilty of any crime." *Id.* Counsel merely noted defendant's involvement in the events surrounding the death of the victim, and argued that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." *Id.* (defendant was charged with murder, kidnapping, and robbery). The Court noted the defendant had "taken defense counsel's statements out of context to form the basis of his claim, and . . . fail[ed] to note the consistent theory of the defense that defendant was not guilty." *Id.* The defendant's *Harbison* objections were overruled. *Id.*

B. State v. Fisher

In *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), the defendant was charged with and tried for first-degree murder. His counsel argued:

> His Honor is going to submit to you a verdict form—Madam Clerk, do we have it drawn up yet? Thank you. In which its going to say, Ladies and Gentlemen of the Jury, Do you find the defendant guilty of murder in the first degree and then down below that it's going to say Do you find him guilty of second degree. Second degree is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard Johnny testify, there was malice there and then another possible verdict is going to say Do you find him guilty of voluntary manslaughter. Voluntary manslaughter is the killing of a human being without malice and without premeditation. It's a killing. And it also has not guilty, remember that too. I asked you about that and it's not a not guilty as in some trial I wasn't there, I don't know a darn thing about it, I wasn't there, never been to Silversteen, never will go there. There are some that say, some defenses that say not guilty, that I was there. It's stupid to be there, it don't make mama proud of being there but I was there.

Id. at 533, 350 S.E.2d at 346.

Our Supreme Court held defendant-Fisher was not entitled to a new trial as the counsel's comments did not admit his guilt and counsel's statement did not fall within the line of cases showing a *Harbison* violation. *Id.* Even though Fisher's counsel admitted malice, an element of the offense, the Court held that his counsel did not admit his client was guilty to murder as charged. *Id.*

Our Court has also recognized, "[a]dmission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *See, e.g.*, *State v. Wilson*, 236 N.C. App. 472, 477, 762 S.E.2d 894, 897 (2014) ("Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*. At best, an admission by Defendant's trial counsel that Defendant pointed a gun at [victim] while still maintaining Defendant's innocence of attempted first-degree murder, would appear to place counsel's statements within the rule in [*State v.*] *Fisher*, and thus still outside of *Harbison*.").

C. State v. Randle

In *State v. Randle*, 167 N.C. App. 547, 550, 605 S.E.2d 692, 693 (2004), this Court reviewed a defendant's assertion his counsel had implicitly conceded his guilt to a lesser-included offense during closing argument without first obtaining his consent. Defendant's counsel told the jury

> they must be entirely convinced of each and every element of the crimes. As serious injury is the essential difference between first and second degree rape, defense counsel then attempted to cast doubt on the seriousness of the mental and physical injuries to [the victim] by arguing [the victim] did not suffer serious injury.

Id. at 549, 605 S.E.2d at 693.

Defendant's counsel also summarized evidence that the defendant had ejaculated on himself. *Id.* In his final sentence to the jury, defense counsel argued, "Teddy Randle is not guilty of first degree rape. Teddy Randle is not guilty of first degree sexual offense." *Id.* Our Court distinguished the *Randle* case from the requirements of *Harbison* because "counsel in the case at bar never actually admitted the guilt of defendant to any charge, nor did counsel claim that defendant should be found guilty of some offense." *Id.* at 552, 605 S.E.2d at 695.

D. State v. Maniego

The State also cites *State v. Maniego*, 163 N.C. App. 676, 683, 594 S.E.2d 242, 246, *appeal dismissed*, *review denied*, 358 N.C. 737, 602 S.E.2d 369 (2004), in which the defendant argued his counsel's opening statement violated *Harbison*. The defendant's counsel stated:

> Maniego put himself in the vehicle with Clifford Miller and David Brandt. He put himself driving the vehicle, he put himself at the scene where David Brandt was murdered by Clifford Miller. Through his statements, you'll hear his testimony in this case and he did make three different statements. The first two are incomplete. The third one is the final version. It's the truth about his involvement in these crimes, and it will show to you that he did not aid and abet in the killing of David Brandt by Clifford Miller, nor did he act in concert with Clifford Miller to kill David Brandt. The fact that he's at the scene where these acts occurred is not enough for you to find him guilty of these crimes.

Id. at 684, 594 S.E.2d at 247. This Court held no *Harbison* violation had occurred to award a new trial because "[a]dmitting a fact is not equivalent to admitting guilt." *Id.* (citation omitted).

E. Defendant's Cases

A review of cases cited by Defendant, wherein this Court awarded new trials based upon counsels' admissions of their client's guilt in closing arguments, also reflects the fallacy of Defendant's argument. Defendant's assertion that his counsel's statements in closing argument denied his constitutional right to effective counsel under *Harbison* is clearly not supported by these cases.

In *State v. Maready*, 205 N.C. App. 1, 4-5, 695 S.E.2d 771, 774-75 (2010), the defendant pled not guilty and was tried before a jury. During his closing argument, defense counsel "conceded that the State had met its burden with respect to the charges of DWI, reckless driving, DWLR and misdemeanor 'larceny and/or possession of stolen property.' " *Id.* at 4, 695 S.E.2d at 774. Counsel also made the following statements:

> We do have the two misdemeanor assaults. . . . We don't contest those. They are inclusive in the events that have significant issues associated with them, but we don't contest those. And you can go and make your decisions accordingly. . . . [Defendant] holds absolute—holds responsibility for [the death of the victim]. I just argue it's not murder. It's Involuntary Manslaughter.

Id. at 4, 695 S.E.2d at 774-75. This Court found:

> Defendant's counsel discussed the elements of involuntary manslaughter with the jury, stating that the second element was "that . . . [D]efendant's impaired driving proximately caused the victim's death. That's true. [Defendant's] guilty of that and should be found guilty of that." Defendant's counsel also stated that: "[Defendant's] already admitted to you guilt . . . to . . . Assault with a Deadly Weapon times two[.]"
>
> At the close of all the evidence and after closing arguments, but before jury instruction, Defendant's counsel again admitted Defendant's guilt to the charges of reckless driving, DWI, DWLR and misdemeanor possession of stolen goods.

Id. at 4-5, 695 S.E.2d at 775. The facts before us are clearly distinguishable from counsel's admissions and statements in *Maready*. *See id.*

Defendant also cites *State v. Spencer*, 218 N.C. App. 267, 275, 720 S.E.2d 901, 906 (2012), wherein the defendant was charged with resisting a public officer and eluding arrest. *See* N.C. Gen. Stat. § 20-141.5(a) (2017) ("It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.").

The defendant's counsel's closing argument in *Spencer* admitted the defendant "chose to get behind the wheel after drinking, and he chose to run from the police" and "Officer Battle was already out of the way and he just kept on going, kept running from the police." *Spencer*, 218 N.C. App. at 275, 720 S.E.2d at 906. This Court held counsel had conceded defendant's guilt to resisting a public officer and to eluding arrest. This Court remanded the case for a determination of whether the defendant had received the proper *Harbison* warnings. *Id.*

VI. Crimes Charged

Defendant's other charges of second-degree rape, second-degree sexual offense, and assault by strangulation were submitted to the jury, in addition to the habitual misdemeanor assault charge. The habitual misdemeanor assault premised upon an assault on a female, was the only count the jury convicted defendant of committing. The State's evidence tended to show Defendant had assaulted and struck Ms. Leonard by pushing her down, biting her, and hitting her in the face, causing injuries of scrapes and bruises to her back and fingers, and bleeding and swelling of her lips.

The trial court instructed the jury that in order for them to find Defendant guilty, the State must prove three things beyond a reasonable doubt: (1) Defendant intentionally assaulted the alleged victim by hitting her; (2) the alleged victim was a female; and, (3) Defendant was a male over the age of 18. The elements of habitual misdemeanor assault are: (1) a simple assault or a simple assault and battery or affray; (2) which causes physical injury; and, (3) two or more prior convictions for either misdemeanor or felony assault. N.C. Gen. Stat. § 14-33.2 (2017).

Counsel's closing argument asserted two people had gotten drunk and argued, which escalated into a fight. Counsel stated, "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." Counsel's statements relayed and summarized the evidence before the jury, which included both the officer's testimony and Defendant's recorded hour-and-a-half long video interview with officers, shown to the jury. In the video interview, Defendant made the statements

that were summarized in counsel's closing argument. Counsel repeated his assertion that Defendant and Ms. Leonard were "[t]wo drunk people [who] got into an argument."

While defense counsel acknowledged the jurors may "dislike Mr. McAllister for injuring Ms. Leonard," he did not state Defendant "assaulted," struck, pushed, bit, or committed any of the specific acts or elements as alleged by the State. Further, counsel did not acknowledge Defendant's age or prior criminal record, both elements of habitual misdemeanor assault.

Our controlling precedents above hold that where counsel admits an element of the offense, but does not admit defendant's guilt of the offense, counsel's statements do not violate *Harbison* to show a violation of the defendant's Sixth Amendment rights. Counsel's statements before us are not consistent with the facts of either *Maready* or *Spencer*, in which *per se* violations are presumed by counsel's admission of a client's guilt to crimes or all the elements thereof without the client's consent. *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897.

Here, counsel's conduct was not *per se* deficient under *Harbison* to award a new trial.

VII. *Strickland v. Washington*

Since counsel's statements do not fall within *Harbison* as *per se* ineffective assistance, Defendant's claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). A defendant's claim of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

However, here, Defendant presents no argument tending to show he was prejudiced by counsel's asserted deficient performance to such

an extent the outcome of the trial would have been different, but for the alleged errors. Defendant has not demonstrated or argued any prejudice. Defendant is not entitled to a new trial on this issue. *Id.*

VIII. Motion for Appropriate Relief

Defendant petitioned this Court on 18 October 2018 to issue another writ of certiorari to review on the merits the trial court's denial of his "Motion to Modify and Terminate Sentence for Ineffective Assistance of Counsel," which the trial court treated as a motion for appropriate relief ("MAR"). The trial court found Defendant's motion presented only matters of law and raised no factual issues to require an evidentiary hearing. The court summarily denied defendant's MAR on 27 July 2017.

Defendant had filed his earlier 11 August 2017 petition for writ of certiorari to this Court. On 29 August 2017, this Court allowed Defendant's petition for the limited purpose of reviewing the 22 August 2016 habitual misdemeanor assault judgment entered immediately after defendant's trial.

In his MAR, Defendant asserted, *inter alia*, his trial counsel had a conflict of interest because his law firm had represented the victim in a similar criminal matter. He asserted claims of ineffective assistance of counsel by his failure to object to alleged false statements of the police, failure to share discovery materials with defendant, and "many constitutional violations."

Defendant failed to provide any supporting affidavits or other evidence beyond the bare assertions in his motion. The General Statutes require a MAR to be supported by affidavit or other documentary evidence. N.C. Gen. Stat. § 15A-1420(b) (2017). "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears." N.C. Gen. Stat. § 15A-1420(c)(6) (2017).

Defendant's failure to provide affidavits or other evidence provided no basis for the trial court to review and be able to determine whether an evidentiary hearing would be required. *See State v. Payne*, 312 N.C. 647, 669, 325 S.E.2d 205, 219 (1985) (Because defendant submitted no supporting affidavits or other documentary evidence with his motion for appropriate relief and the alleged fact was not ascertainable from the record or transcripts submitted, the Court "cannot address the merits of defendant's request for appropriate relief"); *State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (1985) ("Since defendant did not comply with G.S. 15A–1420(c)(6), the trial court's summary denial of the motion for appropriate relief was not error.").

Without any factual support, the trial court's summary denial of Defendant's MAR was proper. Defendant's subsequent and pending petition for writ of certiorari filed 17 October 2018 is denied.

IX. Conclusion

This case is controlled by the precedents and holdings in *Gainey*, *Fisher*, *Randle*, and *Maniego*. Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant admitted to his prior assault convictions to support the charge for habitual misdemeanor assault.

There is no error in the jury's verdict or in the judgment entered thereon. Defendant's pending petition for writ of certiorari filed 17 October is denied. *It is so ordered.*

NO ERROR.

Judge STROUD concurs.

Judge ARROWOOD dissenting with separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. I would hold that, under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), there was a *per se* violation of defendant's right to effective assistance of counsel.

On appeal, defendant first argues that he was denied his constitutional right to effective assistance of counsel when his counsel conceded he was guilty of assault on a female during closing arguments. Defendant relies on our Supreme Court's decision in *Harbison*, and contends his counsel's concession amounts to a *per se* violation of the Sixth Amendment, thereby requiring a new trial.

In *Harbison*, the Court noted that it recently adopted in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), the two-part test for resolving claims of ineffective assistance of counsel enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). *Harbison*, 315 N.C. at 178, 337 S.E.2d at 506. That two-part test requires:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel

> made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693) (emphasis omitted). Our Supreme Court has more recently explained the test and the required showings as follows:

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

In *Harbison*, however, the Court recognized that, "[a]lthough [it] still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " 315 N.C. at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984)). For example, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507. The Court reasoned,

> [w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. Consequently, the Court held that "ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-508.

In the present case, the State brought the potential for a *Harbison* issue to the trial court's attention prior to opening statements. The State explained that defendant did make some admissions in a statement to law enforcement and cautioned that the court may need to make a *Harbison* inquiry if defense counsel is going to address the admissions in the opening statements. The trial court then questioned the defense as follows:

> THE COURT: Does the defense have any Harbison issues?
>
> [DEFENSE]: Not immediately, Your Honor. That's not something I was expecting yet.
>
> THE COURT: Are you expecting to make any comments in your opening with regard to admissions?
>
> [DEFENSE]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against --
>
> THE COURT: Well, can you get more specific than that. Because I want to make sure your client understands that the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.
>
> [DEFENSE]: Not in opening, I can stipulate to that.

The exchange ended with the court stating, "[l]et's rereview that when we get back from lunch." The court, however, did not come back to the issue. In fact, there is no further mention of the potential *Harbison* issue in the record.

The evidence presented by the State at trial included a video of defendant's interview with police. In that interview, defendant admitted to a physical altercation with the alleged victim that resulted in the alleged victim sustaining injuries.

It appears from the record that defense counsel knew the interview was damaging to defendant's case and addressed it during the closing

arguments. Defense counsel suggested to the jury that the interview was coercive, noting that it was "9:00 at night, surrounded by cops, pulled off the street to make a voluntary statement[,]" and they begin talking to defendant about a moped that is unrelated to these charges. Defense counsel then, however, made the following statements:

> You heard [defendant] admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now they run with his one admission and say "well, then everything [the alleged victim] -- everything else [the alleged victim] said must be true."
>
> Because [defendant] was being honest, they weren't honest with him.

Following these statements, defense counsel returned to highlighting the coercive nature of the interview, stating, "[t]wo detectives for three hours into midnight. The whole time he's thinking he's going home."

Later in the closing argument, defense counsel stated that "[the alleged victim] was injured by [defendant]" and addressed the severity of the charges by stating, "[t]his is as serious as it gets, second-degree rape, second-degree sexual assault, assault by strangulation." Defense counsel did not mention the assault on a female charge serving as the underlying offense for habitual misdemeanor assault. Finally, in concluding the arguments to the jury, defense counsel stated,

> Jury, what I'm asking you to do is you may dislike [defendant] for injuring [the alleged victim], that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn't rape this girl. . . .
>
> . . . All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

Defendant now contends these statements by defense counsel during closing arguments amounted to a concession of guilt to the charge of assault on a female without his consent, in violation of *Harbison*. In response to defendant's *Harbison* argument, the State briefly contends

that this case does not fall under the prohibition in *Harbison* because "there was never any specific concession of guilt" because "[c]ounsel never stated to the jury that defendant was guilty of assault on a female in contrast to the counsel in *Harbison*." The State cites various cases in which our courts have determined there were no *Harbison* violations, such as cases in which counsel admitted an offense that was not charged, *see State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d. 165 (2002); *State v. Wilson*, 236 N.C. App. 472, 762 S.E.2d 894 (2014), or cases in which counsel did not concede all elements of the offense charged, *see State v. Hinson*, 341 N.C. 66, 459 S.E.2d 261 (1995); *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986); *State v. Maniego*, 163 N.C. App. 676, 594 S.E.2d 242 (2004). The State further contends that defense counsel in this case "asked the jury to find defendant not guilty of the charged offenses" at the close of his argument.

Upon review of these cases, I would hold defense counsel's statement to the jury in closing arguments amounted to a concession of defendant's guilt to assault on a female. Defense counsel did not simply recite evidence, he choose to highlight specific evidence that defendant physically injured the alleged victim and argued to the jury that defendant honestly admitted to police what he did. It appears defense counsel used this strategy in order to cast doubt on the allegations of more serious offenses that defendant did not admit to police. Defense counsel further indicated defendant was wrong for his actions, defendant felt bad about his actions, and explicitly stated "he did wrong, God knows he did." I agree with defendant that defense counsel's statements amount to an admission to assault on a female, distinguishing this case from those cases cited by the State. Furthermore, the State mischaracterizes defense counsel's final plea to the jury to find defendant not guilty. As shown above, defense counsel only emphasized the serious nature of second-degree rape, second-degree sexual assault, assault by strangulation. Defense counsel then, after repeating those three charges, asked the jury to find defendant not guilty.

Considering defense counsel's argument in full, it is evident defense counsel acknowledged defendant's guilt on the assault on a female charge in an attempt to cast doubt on the evidence of the more serious charges.

For the majority of the State's response, the State does not focus on the substance of defense counsel's argument. Instead, the State focuses on defense counsel's strategy. The State emphasizes that the uncontroverted evidence was that defendant admitted to police during the

interview that he got physical with the alleged victim and contends it was a valid trial strategy for defense counsel to accept the evidence of assault on a female and argue doubt in the evidence of the more severe charges. The State asserts that this was defendant's "only viable defense" and acknowledges that it was successful because defendant was acquitted of the more severe charges. Thus, the State argues defense counsel was not ineffective and defendant cannot show prejudice. This argument by the State, however, does not address the *Harbison* issue.

"[M]atters of trial strategy . . . are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). However, just as our Supreme Court explained in *Harbison*, this Court has explained that

> [a] concession of guilt by a defendant's counsel has the same practical effect as a guilty plea, because it deprives the defendant of his right against self-incrimination, the right of confrontation and the right to trial by jury. Therefore, a decision to make a concession of guilt as a trial strategy is, like a guilty plea, a decision which may only be made by the defendant and a concession of guilt may only be made with the defendant's consent. Due process requires that this consent must be given voluntarily and knowingly by the defendant after full appraisal of the consequences and a clear record of a defendant's consent is required.

State v. Perez, 135 N.C. App. 543, 547, 522 S.E.2d 102, 106 (1999) (citations omitted), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000).

> [This Court] reject[ed], however, [the] defendant's argument that an acceptable consent requires the same formalities as mandated by statute for a plea of guilty. Our Supreme Court has found a knowing consent to a concession of guilt in compliance with *Harbison* where the record showed the defendant was advised of the need for his authorization for the concession, defendant acknowledged that he had discussed the concession with his counsel and had authorized it, and the defendant thereafter acknowledged that his counsel had made the argument desired by him.

Id. at 547-48, 522 S.E.2d at 106 (citations omitted).

Here, defendant does not question the strategy of defense counsel, because that is not at issue. Defendant only challenges defense counsel's concession of guilt on the charge of assault on a female without his authorization. I agree with defendant that there is nothing in the record to show that he agreed to defense counsel's concession. Therefore, under *Harbison*, there was a *per se* violation of defendant's right to effective assistance of counsel. No further showing is required. Accordingly, I would hold defendant is entitled to a new trial on the charge of assault on a female, the underlying offense for habitual misdemeanor assault.

Defendant also seeks for this Court to review the trial court's denial of his MAR pursuant to his second petition for *writ of certiorari* filed at the same time as his appellate brief on 17 October 2018. Unlike the majority, I would simply deny defendant's second petition as moot because of my determination defendant is entitled to a new trial on the first issue.

For the reasons above, I dissent.

STATE OF NORTH CAROLINA
v.
JEFFERY MARTAEZ SIMPKINS

No. COA18-725

Filed 7 May 2019

Constitutional Law—right to counsel—pro se—statutory inquiry—forfeiture

A criminal defendant was entitled to a new trial based on a violation of his right to counsel where the trial court failed to make a proper inquiry of defendant's decision to proceed pro se pursuant to N.C.G.S. § 15A-1242, including informing him of the range of permissible punishments for the crimes charged; defendant did not clearly and unequivocally waive his right to counsel; and there was no clear evidence that defendant forfeited his right to counsel by serious misconduct or that he engaged in dilatory conduct after being warned that such conduct would be treated as a request to proceed pro se.

Judge TYSON concurring in part and dissenting in part.

STATE v. SIMPKINS

[265 N.C. App. 325 (2019)]

Appeal by defendant from judgments entered on or about 8 June 2017 by Judge Andrew Taube Heath in Superior Court, Stanly County. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for resisting a public officer and failing to exhibit/surrender his license. Because the trial court did not properly instruct defendant on waiver of the right to counsel under North Carolina General Statute § 15A-1242 and because defendant did not forfeit his right to such an instruction, we conclude defendant must receive a new trial.

I. Background

In July of 2016, Officer Trent Middlebrook of the City of Locust was on patrol; he ran the "tag" of a vehicle and discovered that the owner of the vehicle, defendant, had a suspended driver's license and a warrant out for his arrest. Officer Middlebrook pulled defendant over and asked for his license and registration. Defendant refused to provide them and was uncooperative and belligerent. Officer Middlebrook arrested defendant.

Defendant's first trial was in district court, and there is no transcript of those proceedings. From the district court, there is an unsigned and undated waiver of counsel form with a handwritten note that appears to say, "Refused to respond to to [(sic)] inquiry by the court and mark as refused at this point[.]" There is also a waiver of counsel form from 16 August 2016 that also has a handwritten notation, "Defendant refused to sign waiver of counsel upon request by the Court[.]" Also on or about 16 August 2016, defendant was convicted in district court of resisting a public officer and failing to carry a registration card. Defendant appealed his convictions to superior court.

In superior court, defendant proceeded *pro se*. Defendant was tried by a jury and convicted of resisting a public officer and failing to exhibit/surrender his license. The trial court entered judgments, and defendant appeals.

II. Subject Matter Jurisdiction

Defendant contends "the trial court lacked subject matter jurisdiction to try [him] in violation of N.C. Gen. Stat. § 20-29 when the citation purporting to charge him was fatally defective." (Original in all caps.) But at oral argument before this Court, defendant's counsel withdrew this argument and conceded that *State v. Jones*, ___ N.C. App. ___, 805 S.E.2d 701, (2017), *aff'd*, ___ N.C. ___, 819 S.E.2d 340 (2018), is the controlling authority on this issue, and defendant cannot prevail. Therefore, this argument is dismissed.

III. Waiver or Forfeiture of Counsel

Defendant argues that "the trial court erred by failing to make a thorough inquiry of . . . [his] decision to proceed *pro se* as required by N.C. Gen. Stat. § 15A-1242." (Original in all caps.) We review whether the trial court complied with North Carolina General Statute § 15A-1242 *de novo*. *See State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A–1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We will therefore review this ruling *de novo*.") (citations omitted)).

North Carolina General Statute § 15A-1242 provides,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2015). "The trial court's inquiry under N.C. Gen. Stat. § 15A–1242 is mandatory and failure to conduct such an inquiry is prejudicial error." *State v. Sorrow*, 213 N.C. App. 571, 573, 713 S.E.2d 180, 182 (2011) (citation and quotation marks omitted).

Defendant contends he

> was advised of his right to have counsel and of his right to have appointed counsel. However, there is no showing

> on the record that the trial court made the appropriate advisements or inquires to determine that . . . [he] understood and appreciate the consequences of his decision or comprehended "the nature of the charges and proceedings and the range of permissible punishments."

While the trial court did inform defendant he could be subjected to "periods of incarceration," the transcript confirms that defendant was not explicitly informed of "the *range* of permissible punishments." N.C. Gen. Stat. § 15A-1242 (Emphasis added). The State acknowledged at oral argument that without informing defendant of the "range of permissible punishments[,]" the trial court could not comply with the mandate of North Carolina General Statute § 15A-1242. Failure to comply with North Carolina General Statute § 15A-1242, if required, would result in prejudicial error. *Sorrow*, 213 N.C. App. 571, 713 S.E.2d 180. But the State contends the trial court was not required to comply with North Carolina General Statute § 15A-1242 due to defendant's forfeiture of his right to counsel.

In oral arguments, both defense counsel and the State relied heavily on *State v. Blakeney*, as it addresses not only the issue before us regarding waiver and forfeiture of counsel, but also thoroughly analyzes many prior cases; therefore, we turn to *Blakeney*, 245 N.C. App. 452, 782 S.E.2d 88 (2016). *Blakeney* first notes that there are two ways a defendant may lose his right to be represented by counsel: voluntary waiver after being fully advised under North Carolina General Statute § 15A-1242 and forfeiture of the right by serious misconduct. *Id.* at 459-61, 782 S.E.2d at 93-94.

> A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution. Our appellate courts have recognized two circumstances, however, under which a defendant may no longer have the right to be represented by counsel.
>
> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A

> trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A–1242. . . .
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant who is abusive toward his attorney may forfeit his right to counsel.

Id. (citations, quotation marks, ellipses, and brackets omitted).

Blakeney then notes a third way a defendant may lose the right to representation by counsel, a hybrid of waiver and forfeiture:

> > Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver

> by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Id. at 464-65, 782 S.E.2d at 96 (quotation marks omitted).

As to the facts in *Blakeney* specifically,

> In this case, neither defendant nor the State asserts that defendant ever asked to represent himself at trial, and our own review of the transcript fails to reveal any evidence that defendant indicated, must less clearly and unequivocally requested, that he be permitted to proceed *pro se*. The record clearly indicates that when defendant signed the waiver of his right to assigned counsel he did so with the expectation of being able to privately retain counsel. Before the trial court the defendant stated that he wanted to employ his own lawyer. There is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel. We conclude that the present case is not governed by appellate cases addressing a trial court's responsibility to ensure that a defendant who wishes to represent himself is knowingly, intelligently, and voluntarily waiving his right to counsel.
>
> . . . .
>
> In this case, the State argues that defendant forfeited his right to counsel, relying primarily upon generalized language excerpted from *Montgomery* stating that a forfeiture of counsel results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel. The State also cites *State v. Quick*, 179 N.C. App. 647, 649–50, 634 S.E.2d 915, 917 (2006), in which this Court cited *Montgomery* for the proposition that any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel. *Montgomery* did not, however, include such a broad holding or suggest that any willful

> actions resulting in the absence of defense counsel are sufficient to constitute a forfeiture. Instead, as this Court has observed, forfeiture of the right to counsel has usually been restricted to situations involving egregious conduct by a defendant[.]

Id. at 460-61, 782 S.E.2d at 93-94 (citations, quotation marks, ellipses, and brackets omitted).

Blakeney then provides a thorough review of the types of behavior prior cases have determined support forfeiture,

> Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.
>
> There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel. However, our review of the published opinions of our appellate courts indicates that, as discussed in *Wray*, forfeiture has generally been limited to situations involving severe misconduct and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal rights. The following is a list of published cases from North Carolina in which a defendant was held to have forfeited the right to counsel, with a brief indication of the type of behavior in which the defendant engaged:
>
> 1. *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000): the defendant fired several lawyers, was disruptive and used profanity in court, threw water on his attorney while in court, and was repeatedly found in criminal contempt.

2. *State v. Quick*, 179 N.C. App. 647, 634 S.E.2d 915 (2006): the defendant in a probation revocation case waived court-appointed counsel in order to hire private counsel, but during an eight month period did not contact any attorney, instead waiting until the day before trial.

3. *State v. Rogers*, 194 N.C. App. 131, 669 S.E.2d 77 (2008), *disc. review denied*, 363 N.C. 136, 676 S.E.2d 305 (2009): over the course of two years, the defendant fired several attorneys, made unreasonable accusations about court personnel, reported one of his attorneys to the State Bar, accused another of racism, and was warned by the court about his behavior.

4. *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009), *disc. review denied*, 691 S.E.2d 414 (2010): during a period of more than a year, the defendant refused to cooperate with two different attorneys, repeatedly told one attorney that the case was not going to be tried, was totally uncooperative with counsel, demanded that each attorney withdraw from representation, and obstructed and delayed the trial proceedings.

5. *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011): for more than a year after defendant was arraigned, he refused to sign a waiver of counsel or state whether or not he wanted counsel, instead arguing that the court did not have jurisdiction and making an array of legally nonsensical assertions about the court's authority.

6. *State v. Cureton*, 223 N.C. App. 274, 734 S.E.2d 572 (2012): the defendant feigned mental illness, discharged three different attorneys, consistently shouted at his attorneys, insulted and abused his attorneys, and at one point spat on his attorney and threatened to kill him.

7. *State v. Mee*, 233 N.C. App. 542, 756 S.E.2d 103 (2014): the defendant appeared before four different judges over a period of fourteen months, during which time he hired and then fired counsel

> twice, was represented by an assistant public defender, refused to state his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and refused to participate in the trial.
>
> 8. *State v. Joiner*, ___ N.C. App. ___, 767 S.E.2d 557 (2014): the defendant gave evasive and often bizarre answers to the court's questions, shouted and cursed at the trial court, smeared feces on the holding cell wall, had to be gagged during trial, threatened courtroom personnel with bodily harm, and refused to answer simple questions.
>
> 9. *State v. Brown*, ___N.C. App. ___, 768 S.E.2d 896 (2015): like the defendants in *Mee* and *Leyshon*, this defendant offered only repetitive legal gibberish in response to simple questions about representation, and refused to recognize the court's jurisdiction.

Id. at 461-63, 782 S.E.2d at 94-95 (quotation marks omitted).

Blakeney then explains how the defendant's actions in *Blakeney* were not as egregious as those in the cases where forfeiture was found:

> In stark contrast to the defendants discussed above, in this case:
>
> 1. Defendant was uniformly polite and cooperative. In fact, the trial court found as a mitigating factor that the defendant returned to court as directed during the habitual felon phase, even after he had been found guilty of the underlying offense.
>
> 2. Defendant did not deny the trial court's jurisdiction, disrupt court proceedings, or behave offensively.
>
> 3. Defendant did not hire and fire multiple attorneys, or repeatedly delay the trial. Although the case was three years old at the time of trial, the delay from September 2011 until August 2014 resulted from the State's failure to prosecute, rather than actions by defendant.
>
> We conclude that defendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his trial, was nowhere close to the serious misconduct that has previously been held to constitute forfeiture of counsel. In reaching this decision,

> we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed *pro se*. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant's failure to hire new counsel might result in defendant's being required to represent himself, and to be advised of the consequences of self-representation.

Id. at 463-64, 782 S.E.2d at 95 (quotation marks omitted).

Ultimately, *Blakeney* determines that based upon the facts the defendant had not forfeited his right to counsel,

> We find *Goldberg's* analysis useful in determining that, on the facts of this case, the defendant cannot be said to have forfeited his right to counsel in the absence of any warning by the trial court both that he might be required to represent himself and of the consequences of this decision.
>
> In reaching this conclusion, we have considered the State's arguments for a contrary result, some of which are not consistent with the trial transcript. On appeal, the State contends that at the outset of trial the trial court found that Defendant had only fired Mr. Cloud so as to attempt to delay the trial, citing page twenty-seven of the transcript. In fact, at the start of the trial, the trial court did not express any opinion on defendant's motivation for seeking to continue the case and hire a different attorney. During the habitual felon phase, after defendant had been found guilty of the charge, the jury was sufficiently concerned about defendant's self-representation to send the trial court a note asking whether defendant had refused counsel. It was only at that point that the trial court expressed its opinion that defendant had hoped to delay the trial by replacing one attorney with another. The State also alleges several times in its appellate brief that the trial court made specific findings about Defendant's forfeiture of his right to counsel, maintaining that the trial

court specifically found that Defendant's conduct in firing his lawyer to delay the trial forfeited his right to private counsel, thus requiring Defendant to proceed *pro se* and urging that we should affirm the trial court's finding that Defendant discharged his private counsel on the day of the trial to obstruct and delay his trial and thereby forfeited his right to counsel. However, as defendant states in his reply brief, the trial court never found that Mr. Blakeney forfeited his right to counsel. Indeed, the word forfeit does not appear in the transcript of the trial proceedings."

There is no indication in the record that the trial court ruled that defendant forfeited the right to counsel by engaging in serious misconduct. Moreover, defendant was not warned that he might have to represent himself, and the trial court did not conduct the inquiry mandated by N.C. Gen. Stat. § 15A–1242, in order to ensure that defendant understood the implications of appearing *pro se*. In *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986), our Supreme Court addressed a factual situation similar both to the present case and to the waiver by conduct scenario discussed in *Goldberg*. In *Bullock*, the defendants' attorneys moved to withdraw shortly before trial, due to irreconcilable differences with the defendant. . . .

. . . .

> The defendant consented to the withdrawal of his retained counsel because of irreconcilable differences but stated that he would employ other counsel. On the day of the trial, he said that he had been unable to get any attorney to take his case because of the inadequate preparation time. The trial court reminded the defendant that he had warned him he would try the case as scheduled. The defendant acquiesced to trial without counsel because he had no other choice. Events here do not show a voluntary exercise of the defendant's free will to proceed *pro se*.

The Court in *Bullock* also cited *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984), noting that in that case the court held that the defendant was entitled to a new trial because the record did not show that the defendant intended to go to trial without the assistance of counsel

> and because the inquiry required by N.C.G.S. § 15A–1242 was not conducted. *Bullock* appears to be functionally indistinguishable from the present case as regards the trial court's obligation to conduct the inquiry required by N.C. Gen. Stat. § 15A–1242.
>
> For the reasons discussed above, we conclude that defendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A–1242, in order to ensure that defendant understood the consequences of self-representation. The trial court's failure to conduct either of these inquiries or discussions with defendant resulted in a violation of defendant's right under the Sixth Amendment to be represented by counsel, and requires a new trial.

Id. at 465-68, 782 S.E.2d at 96-98 (citations, quotation marks, ellipses, and brackets omitted).

Turning to the facts before us, defendant did not "clearly and unequivocally" waive his right to counsel nor did the trial court comply with North Carolina General Statute § 15A-1224 as it failed to inform defendant of "the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242; *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93. Thus, we consider whether "defendant engage[ed] in such serious misconduct that he forfeit[ed] his constitutional right to counsel" or if the "hybrid situation" is applicable where "[a] defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed pro se cannot complain that a court is forfeiting his right to counsel." *Id.* at 460-464, 782 S.E.2d at 93-96.

Both the State and defendant quote large sections of the discussions had by defendant and the trial court as evidence of forfeiture or the lack thereof, but as a whole there is no clear evidence of forfeiture. In summary, defendant raised arguments that were not legally sound and made unreasonable requests of the Court, including questioning the jurisdiction of the trial court and stating that he wanted an appointed attorney -- but not one paid for by the State. Defendant did state he would like to retain

his own counsel, but the State objected unless he could retain the counsel within 15 minutes because "[h]e's been advised, I would contend, on at least two or three occasions . . . as to his rights to obtain an attorney."[1] Defendant countered that he was not informed his trial would start that day but merely that he had "to be here or . . . be arrested." Thereafter defendant agreed to standby counsel, and the trial court informed him that at any point he could "step in" as counsel. The trial court never warned defendant that he was engaging in "dilatory conduct" or that he may lose his right to counsel based upon "dilatory conduct[.]" *Id.* at 464-65, 782 S.E.2d at 96. But before the jury was empaneled the trial court announced it was turning its "attention to the issue of standby counsel" and defendant waived his right to standby counsel.

However, defendant was not combative or rude. There is no indication defendant had ever previously requested the case to be continued, so defendant did not intentionally delay the process by repeatedly asking for continuances to retain counsel and then failing to do so. As a whole defendant's arguments did not appear to be designed to delay or obstruct but overall reflected his lack of knowledge or understanding of the legal process. Ultimately, defendant was neither combative nor cooperative, and both trial court and defendant's tone express frustration.

Defendant's case, like *Blakeney*, is inapposite from *Montgomery*, *Quick*, *Rogers*, *Boyd*, *Cureton*, *Mee*, and *Joiner*, as defendant here had not fired or refused to cooperate with multiple lawyers, was not disruptive, did not use profanity or throw objects, and did not explicitly waive counsel but then fail to hire his own attorney over the course of several months. *See id.* at 462-63, 782 S.E.2d at 94-95. Even the cases with more factual similarities ultimately diverge from this case. *See id.* In both *Brown* and *Leyshon*, the defendants were found to have "obstructed and delayed the trial proceedings" because they had at least three hearings to discuss the matter; here it appears this was defendant's only appearance before the trial court. *See State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015); *State v. Leyshon*, 211 N.C. App. 511, 518-19, 710 S.E.2d 282, 288-89 (2011).

This case also diverges from *Blakeney*, as in that case a specifically enumerated ground for not finding forfeiture was because the defendant did not challenge the jurisdiction of the court. *Blakeney*, 245 N.C. App. at 463, 782 S.E.2d at 95. Here, defendant repeatedly denied the trial court's

1. The State was apparently referring to defendant's proceedings in district court, since there is no prior indication of advisement in superior court.

jurisdiction and insisted on an attorney that was provided for him but was not paid for by the State, an unavailable option. Further, *Blakeney*, ultimately relied on two cases which are also distinguishable: In *State v. Bullock* and *State v. McCrowre*, the defendants had the clear intent to hire private counsel. *See Blakeney*, 245 N.C. App. at 467-68, 782 S.E.2d at 97-98; *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108-109 (1986); *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984).

Ultimately, after considering all of the factors noted in the cases discussed above, we conclude that the reasoning in *Blakeney* applies:

> defendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A–1242, in order to ensure that defendant understood the consequences of self-representation. The trial court's failure to conduct either of these inquiries or discussions with defendant resulted in a violation of defendant's right under the Sixth Amendment to be represented by counsel, and requires a new trial.

Id. at 468, 782 S.E.2d at 98. Because defendant did not "voluntarily waive the right to be represented by counsel" or "engage[] in such serious misconduct as to warrant forfeiture of the right to counsel" the trial court was required to comply with the mandate of North Carolina General Statute § 15A-1242. *Id*. Further, without any finding of dilatory conduct or warning that he may waive his right by dilatory tactics, the hybrid situation cannot apply here. *Id*. at 464-65, 782 S.E.2d at 96 ("This makes sense since a waiver *by conduct* requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*." (emphasis added)). As the trial court failed to properly advise defendant of his right to counsel, defendant must receive a new trial. *See id*. at 468, 782 S.E.2d at 98.

IV. Conclusion

Because defendant did not waive his right to counsel after proper advisement under North Carolina General Statute § 15A-1242; did not forfeit his right by serious misconduct; and did not engage in dilatory

tactics after having been warned of the consequences; he did not forfeit his right to counsel, so defendant must receive a new trial.

NEW TRIAL.

Judge COLLINS concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part and dissenting in part.

I. Background

City of Locust Police Officer Trent Middlebrook was patrolling during July of 2016. He came upon and verified the validity of the registration of a vehicle. Officer Middlebrook was informed the owner of the vehicle, Defendant herein, Jeffrey Martaez Leroy Simpkins' driver's license was suspended, and an outstanding warrant for his arrest was issued and pending. Officer Middlebrook stopped the vehicle and asked Defendant to present his driver's license and registration. Defendant refused to provide either of them and was uncooperative and belligerent. Officer Middlebrook placed Defendant under arrest.

Defendant initially appeared and was tried in district court. He refused to enter a plea, and the trial court noted in the record that it entered a plea of not guilty on his behalf. He also twice refused to sign a waiver of counsel, after being advised of his rights as set out in North Carolina General Statutes § 15A-1242. Included in the record on appeal is an unsigned and undated waiver of counsel form with a handwritten note that states, "Refused to respond to to [*sic*] inquiry by the court and mark as refused at this point[.]"

There is another waiver of counsel form in the record, dated 16 August 2016 and signed by the presiding judge, which shows Defendant being advised of his rights as set out in North Carolina General Statutes § 15A-1242, and also contains a handwritten notation, "Defendant refused to sign waiver of counsel upon request by the Court[.]" On 16 August 2016, Defendant was tried and convicted in district court of resisting a public officer and failing to carry a registration card. The district court's judgments also expressly note that Defendant had waived counsel. Defendant appealed his convictions to superior court.

In superior court, Defendant did not assert he was indigent, but requested appointment of counsel, "not paid for by the State of North

Carolina." No affidavit of indigency appears in the record. He also refused to enter a plea or to sign a waiver of counsel. After an extensive colloquy with the trial court, a plea of not guilty was entered on his behalf and the court appointed standby counsel. Defendant's "Living man" *pro se* motion to dismiss asserting lack of jurisdiction was heard and denied by written order dated 7 June 2017. Defendant eventually elected in open court to dismiss and to waive his appointed standby counsel, and to proceed *pro se*. Defendant was tried by a jury and convicted of resisting a public officer and of failing to exhibit/surrender his license. The trial court entered judgments on the verdicts. The judgments again expressly note that Defendant had waived counsel. Defendant appeals.

II. Subject Matter Jurisdiction

I concur to dismiss Defendant's challenge to subject matter jurisdiction. Defendant's counsel conceded that *State v. Jones*, ___ N.C. App. ___, 805 S.E.2d 701 (2017), *aff'd*, 371 N.C. 548, 819 S.E.2d 340 (2018), is the controlling authority on this issue and withdrew this argument.

III. Issue

Defendant argues that "the trial court erred by failing to make a thorough inquiry of . . . [his] decision to proceed *pro se* as required by N.C. Gen. Stat. § 15A-1242."

IV. Standard of Review

Whether the trial court complied with North Carolina General Statutes § 15A-1242 is reviewed *de novo*. *See State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A–1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We will therefore review this ruling *de novo*.") (citations omitted)). Whether Defendant was entitled to or forfeited counsel is also reviewed *de novo*. *See State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982); *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016).

V. Waiver or Forfeiture of Counsel

The State acknowledged at oral argument Defendant was not informed in the superior court of the "range of permissible punishments[,]" and Defendant had not waived counsel under North Carolina General Statutes § 15A-1242.

North Carolina General Statutes § 15A-1242 provides,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2017).

Defendant concedes he

> was advised of his right to have counsel and of his right to have appointed counsel. However, there is no showing on the record that the trial court made the appropriate advisements or inquires to determine that [he] understood and appreciated the consequences of his decision or comprehended the nature of the charges and proceedings and the range of permissible punishments.

While the trial court did inform Defendant he could be subjected to "periods of incarceration" if convicted, the transcript confirms Defendant was not explicitly informed of "the *range* of permissible punishments." N.C. Gen. Stat. § 15A-1242. In *State v. Sorrow*, this Court previously held: "The trial court's inquiry under N.C. Gen. Stat. § 15A–1242 is mandatory and failure to conduct such an inquiry is prejudicial error." *State v. Sorrow*, 213 N.C. App. 571, 573, 713 S.E.2d 180, 182 (2011) (citation and quotation marks omitted).

The State argues a *per se* new trial is not required, as Defendant forfeited counsel and cannot show any prejudice, given his history of belligerent and recalcitrant behaviors, and his non-acceptance and continued denial of and challenge to the trial court's jurisdiction over him. Defendant persisted in his jurisdictional challenges, even after his filed motion to dismiss on jurisdiction was formally denied by written order with findings of fact and conclusions of law, as Defendant had requested. Defendant has not appealed the entered order denying his motion to

dismiss, and any arguments concerning the trial court's jurisdiction are conceded and wholly without merit.

The State argues Defendant forfeited his right to counsel and asserts the trial court was not required to comply with North Carolina General Statutes § 15A-1242. Both parties' arguments cite and rely upon *State v. Blakeney*, 245 N.C. App. 452, 782 S.E.2d 88 (2016). *Blakeney* discusses two means by which a defendant may lose his right to be represented by counsel: (1) voluntary waiver after being fully advised under North Carolina General Statutes § 15A-1242; and, (2) forfeiture of the right by serious misconduct. *Id.* at 459-61, 782 S.E.2d at 93-94.

> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242. . . .
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant

> who is abusive toward his attorney may forfeit his right to counsel.

Id. (internal citations and quotation marks omitted).

The Court in *Blakeney* also describes a third manner, a mixture of waiver and forfeiture, in which a defendant may lose the right to counsel:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed pro se cannot complain that a court is forfeiting his right to counsel.*

Id. at 464-65, 782 S.E.2d at 96 (emphasis supplied) (quotation marks omitted).

This Court in *Blakeney* stated:

> In this case, the State argues that defendant forfeited his right to counsel, relying primarily upon generalized language excerpted from *Montgomery* stating that a forfeiture of counsel results when the state's interest in maintaining an orderly trial schedule and *the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel.* The State also cites *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006), in which this Court cited *Montgomery* for the proposition that *any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel. Montgomery* did not, however,

> include such a broad holding or suggest that any willful actions resulting in the absence of defense counsel are sufficient to constitute a forfeiture. Instead, as this Court has observed, forfeiture of the right to counsel has usually been restricted to situations involving egregious conduct by a defendant[.]

Id. at 461, 782 S.E.2d at 94 (emphasis supplied) (internal citations marks omitted).

This Court in *Blakeney* reviewed behavior in prior cases to support forfeiture.

> Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.
>
> *There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel.* However, our review of the published opinions of our appellate courts indicates that, as discussed in Wray, forfeiture has generally been limited to situations involving severe misconduct and *specifically to cases in which the defendant engaged in one or more of the following*: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; *or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal rights.*

Id. at 461-62, 782 S.E.2d at 94 (emphasis supplied) (quotation marks omitted).

The majority's opinion includes brief descriptions of the nine prior decisions cited in *Blakeney*, wherein this Court found the defendants had forfeited their right to counsel. Whether a "defendant engage[d] in such serious misconduct that he forfeit[ed] his constitutional right to counsel," or if the "hybrid situation" is applicable where "[a] defendant

who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel." *Id.* at 460, 465, 782 S.E.2d at 93-94, 96.

In their briefs, both the State and Defendant quote large sections of the discussions had by Defendant and the trial court as evidence of forfeiture or the lack thereof. Overall, the transcript supports a finding and conclusion that Defendant forfeited his right to counsel. From the start of the proceedings, Defendant repeatedly questioned the jurisdiction of the trial court:

> [Defendant]: Objection, sir. I did not enter any pleas. Do I need to stand?
>
> THE COURT: What is the basis of your objection?
>
> [Defendant]: There is no proof of jurisdiction here. There hasn't been since last year. I've been coming here over a year, and there's no evidence of anything besides the allegation.
>
> THE COURT: Well, sir, evidence is put on at the trial. So there is no evidence at this point.
>
> [Defendant]: So how can you force someone here without evidence, sir?
>
> THE COURT: You've been charged with a crime. And this is your day in court, your opportunity to be heard.

The trial court and Defendant engaged in detailed discussions concerning Defendant's representation:

> [The Court]: Mr. Simpkins, I see that in the Court's file there are waiver of counsel forms with notations that you refused to respond when you were notified of your right to an attorney, and so you were marked down as having waived an attorney. You are charged with violations that could subject you to periods of incarceration. *And so I would like to advise you that it is your right to have an attorney and if you cannot afford an attorney, the State can provide one for you. If you would like to apply for court-appointed counsel, we'll have you fill out an affidavit. If you wish to retain your own, you certainly have that opportunity as well.* How would you like to proceed with respect to an attorney?

> [Defendant]: May I proceed with counsel that's not paid for by the plaintiff?
>
> [The Court]: There's no plaintiff in this case. Would you like to hire your own attorney or would you like the State to provide an attorney for you *if you qualify for one*?
>
> [Defendant]: How is there no plaintiff, sir?
>
> [The Court]: Sir, this is the second time that I'm going to remind you that it is not your opportunity to ask questions of the Court. The Court asks you questions. The question before you right now is: *Would you like to apply for a court-appointed attorney, or would you like to retain your own attorney or would you like to waive your right to an attorney?*
>
> [Defendant]: I would like counsel that's not paid for by the State of North Carolina.
>
> [The Court]: Okay. So you would like an *opportunity to retain your own attorney*?
>
> [Defendant]: That's not paid for by the State of North Carolina, yes.

(Emphasis supplied).

When asked for its response, the State objected unless Defendant could retain the counsel within fifteen minutes because "[h]e's been advised, I would contend, on at least two or three occasions . . . as to his rights to obtain an attorney."

The colloquy continued, and Defendant was appointed standby counsel:

> [The Court]: Mr. Simpkins, according to the court file, you were advised of your right to an attorney on August 16th of 2016.
>
> [Defendant]: I asked for standby counsel then, sir.
>
> [The Court]: Would you like to be appointed standby counsel today?
>
> [Defendant]: Yes. Sure.
>
> [The Court]: All right.

Defendant never asserted he was indigent or was unable to afford to retain counsel. The record before us does not contain Defendant's affidavit of indigency to qualify for appointed counsel. Defendant's right to be appointed counsel was dependent upon a claim, an affidavit, and a finding of him being indigent. *State v. Cradle*, 281 N.C. 198, 204, 188 S.E.2d 296, 300 (1972).

Defendant continued to question the trial court's jurisdiction prior to and after jury selection:

> THE COURT: Any questions before we proceed?
>
> [Defendant]: Can the Court proceed without evidence of jurisdiction?
>
> THE COURT: Sir, evidence will be presented during the case in chief after a jury is selected. Any other questions?
>
> [Defendant]: If -- no.
>
> . . .
>
> [Defendant]: Can I see the evidence of jurisdiction then?
>
> THE COURT: Sir, you -- you are the defendant in a criminal proceeding.

Following the trial court's address to the prospective jurors, the jurors left the courtroom and a bench conference was held between the trial court, Defendant, Defendant's standby counsel, and the prosecutor, concerning a possible plea:

> THE COURT: What I heard at the bench was the mention of a potential plea. So, Mr. Simpkins, is it your wish to enter a plea in this matter?
>
> [Defendant]: I've been trying to enter a plea. I just wanted the evidence of jurisdiction.

The plea negotiations were ultimately unsuccessful. The trial court advised Defendant on his right to proceed with or to waive his standby counsel, which Defendant decided to waive and to proceed *pro se*. Defendant conducted jury selection on his own.

After bringing the trial court's attention to a previously filed motion to dismiss, and hearing the trial court's ruling on the motion, Defendant *again* argued with the trial court concerning its jurisdiction:

THE COURT: All right. Would you like to be heard on the motion?

[Defendant]: No. The motion speaks for itself, sir.

THE COURT: All right. The motion to dismiss is denied. Thank you.

[Defendant]: On what grounds, sir?

THE COURT: Well, to the extent that the motion is a motion to dismiss for lack of jurisdiction, I find and conclude that this Court has jurisdiction --

[Defendant]: May I have a copy of that, sir?

THE COURT: A copy of what?

[Defendant]: The jurisdiction.

THE COURT: Jurisdiction is not reduced to writing or a document that I can hand you. Thank you.

[Defendant]: So it's territorial?

THE COURT: Sir, I've ruled on the motion. Thank you.

[Defendant]: I don't get to speak at all, sir?

THE COURT: You were just heard on the motion. I issued my ruling. I issued my findings and conclusion. And that is all for that matter. Thank you, sir.

[Defendant]: Okay. Do I have a right to a fair and meaningful hearing if there's conflict of interest?

THE COURT: I'm sorry?

[Defendant]: Do I have the right to a fair and meaningful hearing if there's a conflict of interest?

THE COURT: You have a right to a fair and impartial hearing of your case, which is what we're doing right now. Okay.

[Defendant]: So --

THE COURT: Please bring in the jury.

[Defendant]: Sir? And what is the jurisdiction?

> THE COURT: This is not an appropriate time to be asking questions. The jurisdiction of the superior court of the State of North Carolina.
>
> [Defendant]: Does jurisdiction have to be submitted before the proceedings proceed?
>
> THE COURT: Please have a seat, sir.

Defendant repeatedly: (1) contested jurisdiction; (2) refused to enter pleas, sign waivers, or complete an affidavit of indigency to qualify for appointed counsel; (3) failed to retain his own counsel in the ten months between his district court and superior court trials; (4) filed motions and raised arguments that were not legally sound; and, (5) made unreasonable requests of the Court. Defendant repeatedly questioned the jurisdiction of the trial court and stated that he wanted an appointed attorney but "not one paid for by the State of North Carolina," something clearly not within the trial court's power.

This appearance and trial took place over three days. Defendant argued he was not informed his trial would start that day, but asserted he had "to be here or . . . be arrested." Defendant requested and was appointed standby counsel. The trial court informed Defendant that at any point standby counsel could "step in" as counsel.

The trial court warned Defendant that he was engaging in "dilatory conduct" by arguing and continuing to question the jurisdiction of the court. *Blakeney*, 245 N.C. App. at 464-65, 782 S.E.2d at 96. Before the jury was empaneled, Defendant initially indicated he intended to enter a plea, though negotiations failed. The trial court announced it was turning its "attention to the issue of standby counsel," and Defendant waived his right to standby counsel.

Defendant sought to delay the process by repeatedly arguing and asking for rulings on jurisdiction, offering and withdrawing guilty pleas, requesting and dismissing standby counsel, and seeking to retain counsel after a ten-month delay between trials and then failing to do so. Defendant never asserted he was indigent and eligible for appointed counsel, nor filed an affidavit of indigency. Viewing the record as a whole, from arrest through district and superior court, Defendant's conduct, tactics, and arguments were designed to deny the legitimacy and jurisdiction of the courts and to delay or obstruct its proceedings. Defendant's prior record reflects extensive contact with the legal system in multiple states and reflects his general attitude that the law does not apply to him and he is above it.

Defendant, like the defendants in the cases of *Montgomery*, *Quick*, *Rogers*, *Boyd*, *Cureton*, *Mee*, and *Joiner*, refused to cooperate, was disruptive and argumentative, explicitly waived counsel twice in district court, failed to hire his own attorney over the course of several months between his district court convictions in August and his scheduled trial in superior court the following June. *See id.* at 462-63, 782 S.E.2d at 94-95.

In cases with more factual similarities, *Brown* and *Leyshon*, the defendants were found to have "obstructed and delayed the trial proceedings" because they had at least three hearings to discuss the matters. The defendants' appearances, motions, and trials in superior court occurred over multiple days. *See State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015); *State v. Leyshon*, 211 N.C. App. 511, 518-19, 710 S.E.2d 282, 288-89 (2011).

The facts before us also diverge from *Blakeney*, as that Court specifically enumerated a ground for not finding forfeiture because the defendant did not challenge or deny the jurisdiction of the court. *Blakeney*, 245 N.C. App. at 463, 782 S.E.2d at 95. Here, Defendant repeatedly denied the trial court's jurisdiction, argued frivolous motions and grounds as a "Living man" and sovereign citizen, refused to accept the trial court rulings, and insisted an attorney be provided for him, but not one "paid for by the State of North Carolina," an unavailable option. In *State v. Bullock* and *State v. McCrowre*, the defendants had the clear intent and opportunity to hire private counsel prior to trial. *See Blakeney*, 245 N.C. App. at 467-68, 782 S.E.2d at 97-98; *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108-109 (1986); *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984).

Looking at the totality of Defendant's statements, conduct, actions, demeanor, and knowledge from prior multiple arrests through trials in both trial court divisions, Defendant knowingly forfeited his right to counsel, dismissed standby counsel, and elected to proceed *pro se*. Defendant also has made no showing nor argued that he was indigent and could not afford, or was unable, to retain counsel during the ten months pendency of his appeal from district court. His arguments are without merit.

VI. Conclusion

Defendant concedes and withdraws his argument on appeal challenging jurisdiction. The State concedes Defendant did not waive his right to counsel under North Carolina General Statutes § 15A-1242. Defendant's overall demeanor and conduct, from arrest through trial

in superior court, supports a finding and conclusion that he dismissed standby counsel and forfeited his right to counsel by frivolous and repeated objections to jurisdiction, serious misconduct, and dilatory tactics, all after being warned of the consequences of his behavior.

Defendant received a fair trial, free of prejudicial errors he preserved or argued. I find no error in Defendant's jury convictions or in the judgments entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ALBERT LEWIS SPEAS

No. COA18-456

Filed 7 May 2019

Indictment and Information—bill of indictment—felonious larceny—entity capable of owning property—sufficiency of name

The words 'and Company' included in the victim's name ('Sears Roebuck and Company') in an indictment for felonious larceny sufficiently identified the victim as a corporation capable of owning property.

Appeal by defendant from judgment entered 10 October 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Charlotte Gail Blake for defendant-appellant.

BRYANT, Judge.

Defendant Albert Lewis Speas appeals from judgment entered upon his conviction for felonious larceny. After careful review, we find no error.

On 14 February 2017, defendant was indicted for felonious larceny and felonious possession of stolen goods. The larceny indictment specifically alleged that defendant "unlawfully, willfully and feloniously

did steal, take and carry away one (1) television, the personal property of Sears Roebuck and Company, having a value of One Thousand Six Hundred Ninety-Nine Dollars and Ninety-Nine Cents ($1,699.99)." Defendant was also indicted for having attained habitual felon status.

On 10 October 2017, defendant was convicted by a jury of both felonious larceny and felonious possession of stolen goods. The trial court arrested judgment on the charge of possession of stolen goods. Defendant subsequently pled guilty to having attained the status of an habitual felon. The trial court sentenced defendant to a term of 89 to 119 months imprisonment. Defendant appeals.

On appeal, defendant's sole argument is that the indictment for larceny is fatally defective because it does not allege that "Sears Roebuck and Company" was an entity capable of owning property. We disagree.

"It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation and quotation marks omitted). "The purpose of an indictment is to give a defendant notice of the crime for which he is being charged[.]" *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). An "indictment must allege all of the essential elements of the crime sought to be charged." *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citation omitted). Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. *State v. Hicks*, 148 N.C. App. 203, 205, 557 S.E.2d 594, 596 (2001).

Here, defendant was indicted for felonious larceny. The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Munford*, 364 N.C. 394, 699 S.E.2d 911 (2010); *see also* N.C. Gen. Stat. § 14-72 (2017). "To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property. If the entity named in the indictment is not a person, it must be alleged that the victim was a legal entity capable of owning property[.]" *State v. Phillips*, 162 N.C. App. 719, 720–21, 592 S.E.2d 272, 273 (2004) (alteration in original) (internal citations and quotation marks omitted). "If the property alleged to have been stolen . . . is the property of a corporation, the name of the corporation should be given, and the fact that it is a

corporation stated, unless the name itself imports a corporation." *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 903 (1960) (internal citation and quotation marks omitted).

The instant indictment charges defendant with larceny of the personal property of "Sears Roebuck and Company." Defendant contends that this is insufficient because, although the indictment contains the word "company," it does not identify "Sears Roebuck and Company" as a company or other corporate entity. We are not persuaded.

In *Thornton*, the North Carolina Supreme Court determined that an indictment which alleged defendant embezzled money belonging to "The Chuck Wagon" was insufficient because it failed to sufficiently identify "The Chuck Wagon" as a corporation, and the name itself did not import a corporation. *Id.* at 662, 111 S.E.2d at 904. By contrast, here, the word "company" is part of the name of the property owner, "Sears Roebuck *and Company*." Our Supreme Court has stated "the words 'corporation,' 'incorporated,' 'limited,' or '*company*,' or their abbreviated form, sufficiently identify a corporation in an indictment." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (emphasis added) (citing *Thornton*, 251 N.C. at 662, 111 S.E.2d at 904); *see also State v. Cave*, 174 N.C. App. 580, 583, 621 S.E.2d 299, 301 (2005) (concluding that an indictment was sufficient because the name "N.C. FYE, Inc." imports a corporation).

Therefore, we conclude the name of the property owner named in the indictment, "Sears Roebuck and Company," was sufficient itself to " 'import[ ] an association or a corporation capable of owning property.' " *Id.* at 83, 772 S.E.2d at 444 (quoting *Thornton*, 251 N.C. at 661, 111 S.E.2d at 903). Accordingly, we hold the larceny indictment here is valid on its face.

NO ERROR.

Judges BERGER and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DEANGELO JERMICHAEL WRIGHT

No. COA18-209

Filed 7 May 2019

1. Sentencing—aggravating factors—notice requirement—waiver

In a prosecution for drug offenses, defendant waived his right to receive the 30-day advance notice of the State's intent to use an aggravating factor to enhance his sentence (required by N.C.G.S. § 15A-1340.16(a6)) where he stipulated to the existence of the aggravating factor after a colloquy conducted in accordance with section 15A-1022.1.

2. Constitutional Law—effective assistance of counsel—direct appeal—claim not ripe for review

In a prosecution for drug offenses, defendant's claim for ineffective assistance of counsel was dismissed without prejudice to his right to assert his claim in a motion for appropriate relief in the trial court.

3. Judgments—criminal—clerical errors—range of sentence—aggravating factor—arrested judgment

In a prosecution for drug offenses, defendant's judgment was remanded for correction of multiple clerical errors, including for the trial court to clarify the correct sentencing range used, to fill out a corresponding form listing the aggravating factor, and to correct which of two counts the court was arresting judgment on.

Appeal by defendant from judgment entered 25 August 2017 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

At issue is whether the State provided the required notice of intent to prove aggravating factors. Because defendant waived his right to have a jury determine the presence of an aggravating factor, there was no error. We dismiss defendant's ineffective assistance of counsel claim without prejudice and remand for correction of clerical errors.

I. Background

Defendant was arrested for selling marijuana to an undercover officer in Charlotte on 7 August 2015 ("first arrest"). Defendant was arrested a second time for selling marijuana to an undercover officer in the same location on 15 October 2015 ("second arrest"). On 11 January 2016, defendant was indicted for the sale and delivery of marijuana and possession with intent to sell or deliver ("PWISD") arising from the second arrest. On 14 April 2016, the State served defendant with a notice of intent to prove aggravating factors for the charges arising only from the second arrest. Box 12a. on the notice was checked, which stated:

> The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of a parole or post-release supervision imposed pursuant to release from incarceration.

On 2 May 2016, defendant was indicted for sale and delivery of a controlled substance, PWISD, and possession of marijuana drug paraphernalia arising from the first arrest. Over a year later, but twenty days prior to trial of all charges against defendant, the State added the file numbers related to defendant's first arrest to a copy of the previous notice of intent to prove aggravating factors. A handwritten note was added to the form which stated, "Served on Defense Counsel on 8/1/2017," and it was signed by an assistant district attorney.

Defendant's trial began on 21 August 2017, and all of defendant's charges arising from the first and second arrests were joined for trial. Defendant was found not guilty of selling, delivering, or PWISD marijuana for the charges arising from the second arrest, but he was found guilty of attempted sale, attempted delivery, PWISD marijuana, and possession of marijuana drug paraphernalia for the charges from the first arrest. The trial court arrested the judgment for attempted sale, and the State informed the court it intended to prove an aggravating factor.

Defendant's attorney stated that he had received the proper notice, and after defendant and his attorney talked, defendant stipulated to the aggravating factor on 25 August 2017. The trial court sentenced defendant in the aggravated range, and defendant timely gave notice of appeal.

II. Notice of Intent to Prove Aggravating Factors

[1] Defendant argues that the trial court erred in sentencing defendant to an aggravated sentence when the State did not provide thirty days written notice before trial of its intent to prove an aggravating factor for charges arising from the first arrest, and defendant did not waive his right to such notice. We review this argument *de novo*:

> The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal. Pursuant to North Carolina's felony sentencing system, the prior record level of a felony offender is determined by assessing points for prior crimes using the method delineated in N.C. Gen. Stat. § 15A-1340.14(b)(1)-(7). As relevant to the present case, a trial court sentencing a felony offender may assess one prior record level point if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision. Prior to being assessed a prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(7), however, our General Statutes require the State to provide written notice of its intent to do so.

State v. Wilson-Angeles, ___ N.C. App. ___, ___, 795 S.E.2d 657, 668 (2017) (citations, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 15A-1340.16(a6) requires the State to give defendant thirty days' written notice before trial, or the entry of a guilty or no contest plea, of its intent to use aggravating factors:

> The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2017). Therefore, at least thirty days prior to a trial or plea, the State must give a defendant written notice of

its intent to prove an aggravating factor. *Id*. Here, defendant was tried on all pending charges, and prior to sentencing, defendant stipulated to the existence of the aggravating factor. N.C. Gen. Stat. § 15A-1022.1 requires the trial court, during sentencing, to determine whether the State gave defendant the required thirty days' notice of its intent to prove an aggravating factor *or* if defendant waived his right to that notice:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). *The court shall also determine whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.*
>
> (b) *In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of G.S. 15A-1022(a)*. In addition, the court shall address the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> . . . .
>
> (e) The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C. Gen. Stat. § 15A-1022.1 (emphasis added).

This Court has not addressed what constitutes waiver of the notice requirement of N.C. Gen. Stat. § 15A-1340.16(a6). "Waiver is the intentional relinquishment of a known right, and as such, knowledge of the

right and an intent to waive it must be made plainly to appear." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015) (citation and quotation marks omitted). In *State v. Snelling*, "the parties stipulated that defendant had 6 prior record level points and was thus a PRL III." 231 N.C. App. 676, 678, 752 S.E.2d 739, 742 (2014). This Court concluded that "the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point." *Id.* at 682, 752 S.E.2d at 744. "Moreover, the record does not indicate that defendant waived his right to receive such notice." *Id.* As a result, this Court remanded the case for a new sentencing hearing. *Id.* at 683, 752 S.E.2d at 744.

Here, after the jury returned verdicts of guilty for charges from the first arrest, the State advised the trial court it intended to prove aggravating factors for sentencing:

> THE COURT: The jury having returned verdicts of guilty in Case No. 16CRS13374, 16CRS13373, counts one and two, and 16CRS13375. The State having announced to the Court that it intends to proceed on aggravating factors in this matter, which is a jury matter. The district attorney has indicated to the Court that in conference with the defense counsel, that the Defendant would stipulate to aggravating factors; is that correct? What says the State?
>
> MR. PIERRIE: I do intend to proceed with aggravating factors. I did have a discussion with Mr. Curcio and indicated his intent was to stipulate to the one aggravating factor that I intended to offer, which was from the AOC form is Factor 12A, that the Defendant has during the ten year period prior to the commission of the offense for which the Defendant is being sentenced been found by a court of this state to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence.
>
> THE COURT: All right. Would you -- is that correct?
>
> MR. CURCIO: *That is correct, Your Honor. I've been provided the proper notice and seen the appropriate documents, Your Honor.*
>
> . . . .

THE COURT: . . . The State having indicated that it's going to proceed on aggravating -- an aggravating factor, which would enhance the punishment that the Court gives in this case. Your lawyer has informed the Court that you will admit that aggravating factor, stipulate to that aggravating factor and not require the jury to make a determination of that aggravating factor. In other words, for aggravating factors, the jury would deliberate just like it just did in the case in chief in determining whether or not that aggravating factor exists. Your lawyer has advised the Court that you are going to stipulate to that aggravating factor. And the jury therefore would not be required to deliberate and decide that issue. Is that correct?

DEFENDANT: Can I have a chance to -- may I have a chance to speak with him?

THE COURT: Yes.

(Discussion held off the record.)

MR. CURCIO: We're ready to proceed, Your Honor.

THE COURT: Is that correct, sir?

DEFENDANT: Yes, sir.

THE COURT: And have you had an opportunity to talk with your lawyer about this stipulation and what the stipulation means?

(Discussion held off the record.)

DEFENDANT: Yes, sir.

THE COURT: And do you now stipulate to the aggravating factor stated by the district attorney?

DEFENDANT: Yes, sir.

. . . .

THE COURT: Do you now waive your right to a -- to have the jury determine the aggravating factor?

(Discussion held off the record.)

DEFENDANT: Yes, sir. I'm ready to proceed.

> THE COURT: And do you waive the right to have the jury determine the aggravating factor and do you stipulate to the aggravating factor?
>
> DEFENDANT: Yes, sir.

(Emphasis added.)

The transcript indicates that the trial court inquired about the notice of the State's intent to prove the aggravating factor, and his counsel responded that he was "provided the proper notice" and had "seen the appropriate documents." The trial court also asked defendant directly if he "had an opportunity to talk with your lawyer about this stipulation and what the stipulation means?" and after discussion off the record, defendant responded, "Yes, sir." We find the trial court's colloquy satisfied the requirements of N.C. Gen. Stat. § 15A-1022.1. *See State v. Khan*, 366 N.C. 448, 455, 738 S.E.2d 167, 172 (2013) ("The record indicates that at the plea hearing the trial court went over the terms of the plea agreement with defendant and asked defendant directly if he understood its terms, and defendant responded, 'Yes.' During the hearing, the trial court also asked defendant if he stipulated to the aggravating factor, and defendant again answered, 'Yes.' We find the trial court's procedure satisfied the requirements of section 15A-1022.1.").

Defendant compares this case to *State v. Mackey*, 209 N.C. App. 116, 708 S.E.2d 719 (2011), but we find the facts of this case to be distinct. In *Mackey*, the defendant objected at trial to the use of the aggravating factor based upon the lack of proper written notice. *Id.* at 119, 708 S.E.2d at 721. The issue in *Mackey* was whether a letter regarding a plea offer could be used to provide notice, and, based upon the contents of the letter, we held it did not give the notice as required by N.C. Gen. Stat. § 15A-1340.16(a6). *Id.* at 126, 708 S.E.2d at 725. The letter simply communicated a plea offer but did not "acknowledge that the purpose of the document was to both give notice of aggravating factors *and* communicate an offer." *Id.* at 121, 708 S.E.2d at 722. In addition, there was a question in *Mackey* regarding proper service of the letter, which was served by facsimile, and defense counsel "represented that he had received the offer, but no notice of the aggravating factors." *Id.* This Court also noted that the State could have used the form created by the Administrative Office of the Courts (AOC–CR–614) specifically to give the required notice. *Id.* Here, there is no issue as to the form of the notice, the content of the notice, or the method of service of the notice, and, therefore, we do not find *Mackey* to be controlling.

This case can also be distinguished from *Snelling* due to the trial court's inquiry into whether defendant had received "proper notice" and his counsel's affirmative response. Even though the State had not technically given "proper notice" because the additional file numbers were added to the notice only twenty days before trial instead of thirty days, defendant and his counsel had sufficient information to give an "intentional relinquishment of a known right." *Ussery*, 368 N.C. at 336, 777 S.E.2d at 279. The trial court specifically inquired about notice, and the aggravating factor in question was the exact same as noted in the original notice of intent. The trial court also directly questioned defendant: "And do you waive the right to have the jury determine the aggravating factor and do you stipulate to the aggravating factor?" and defendant answered "Yes, sir." We conclude that defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the thirty day advance notice of the State's intent to use the aggravating factor.[1] This argument is overruled.

III. Ineffective Assistance of Counsel

[2] Defendant argues "that he received ineffective assistance of counsel at sentencing." However, "[i]n general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). We dismiss defendant's ineffective assistance of counsel claim without prejudice to his right to assert his claim in a motion for appropriate relief at the trial level.

IV. Clerical Errors

[3] Defendant argues that the judgment contains clerical errors which should be remanded for correction. We agree.

"A clerical error is defined as, an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (quotation marks and brackets omitted).

Defendant's AOC-CR-603C Judgment Suspending Sentence form for file number 16 CRS 013374 is checked by box one which states:

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1. We note that on the AOC-CR-605 form, Felony Judgment Findings of Aggravating and Mitigating Factors, the trial court checked the box under "DETERMINATION" which states, "the State provided the defendant with appropriate notice of the aggravating factor(s) in this case."

> [The Court] makes no written findings because the prison term imposed is within the presumptive range of sentences authorized under G.S. 15A-1340.17(c).

But defendant was sentenced to a minimum of 7 months and a maximum of 18 months in the custody of the N.C. Division of Adult Correction. The presumptive range for a defendant with prior record level of III for a Class I felony is 5-6 months minimum and 15-17 months maximum. Defendant was sentenced in the aggravated range as the State requested during sentencing:

> On the possession with intent to sell or deliver marijuana, a Class I felony, that is an I block. So an active sentence cannot be imposed by law. However, I'd ask for at the top of the aggravated on that sentence would be eight to 19-month sentence with an extensive supervised probation.

Shortly thereafter, the trial court sentenced defendant within the aggravated range:

> In Case No. 16CRS13374, the possession with intent to sell and deliver marijuana, it is the judgment of the Court that Case No. 16CRS13375, be consolidated in that case for purposes of sentencing. And that the Defendant be committed to the custody of the North Carolina Department of Corrections for a period of not less than seven months and no more than 18 months.

Therefore, box two should have been checked on the form indicating that:

> [The Court] makes the Determination of aggravating and mitigating factors on the attached AOC-CR-605.

It is apparent from the transcript that the trial court sentenced defendant in the aggravated range based upon the factor as stipulated. In fact, defendant expressed his displeasure with the sentence, but his comments show he was fully aware of the aggravating factor, since he noted that he had done two years on probation and "didn't get violated till the end. Till my last month getting off probation. I got violated for a misdemeanor."

There is also a clerical error on the form arresting judgment (AOC-CR-305). At trial, the State clarified which count for file number 16 CRS 13373 was the sale and which was the delivery:

> MR. PIERRIE: Count 1 is the sale. In 13373, Count 1 is indicted as sale of marijuana. And Count 2 of 16CRS13373 is indicted as delivery.

The jury found defendant guilty of both counts, and the trial court arrested judgment for the second count:

> The jury having returned verdicts of guilty in Cases 16CRS13373, counts one and two . . . . The Court arrest judgment in Count 2 of Case No. 16CRS13373.

However, on AOC-CR-305 the trial court mistakenly arrested judgment for count one, "ATTEMPTED SELL MARIJUANA."

We remand for the limited purpose of checking box two on defendant's AOC-CR-603C form for file number 16 CRS 013374 and to fill out a corresponding AOC-CR-605. In addition, the AOC-CR-305 for file number 16 CRS 013373 should be corrected on remand to reflect that judgment was arrested for attempted delivery of marijuana.

V. Conclusion

Defendant received a fair trial, free of prejudicial error, but we dismiss his ineffective assistance of counsel claim without prejudice and remand for the limited purpose of correcting two clerical errors.

NO ERROR IN PART; DISMISSED IN PART WITHOUT PREJUDICE; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges ZACHARY and MURPHY concur.

THOMAS v. BURGETT

[265 N.C. App. 364 (2019)]

TRACY SUSAN THOMAS, PLAINTIFF
v.
JEFFRY PAUL BURGETT, DEFENDANT

No. COA18-783

Filed 7 May 2019

1. Child Custody and Support—support—monthly gross income—deductions—rental property expenses

A child support order was vacated and remanded for more specific findings regarding a father's rental property expenses where there was no indication that the trial court took into account the rental property's insurance and property tax expenditures when calculating gross monthly income. The Court of Appeals declined to remand for findings regarding imputation of rental income—based on the mother's argument that the father deliberately rented the property to his son below market value—because the mother did not raise the issue in the trial court.

2. Child Custody and Support—support—extraordinary expenses—after-school activity—speculative evidence

In calculating a father's child support obligation, the trial court's determination that his child required $500 per month for band expenditures was not based on competent evidence where the child had not yet been accepted to the honor band to which she had applied. If, on remand (for another issue), the trial court heard nonspeculative evidence from which it could determine the child was actually participating in the band, it was directed to make findings in support of any award based on those expenses.

3. Child Custody and Support—support—N.C. Child Support Guidelines—deviation—lack of requisite findings precluding review

The trial court failed to justify its deviation from the N.C. Child Support Guidelines—by deciding not to grant a father a credit for the social security payments received by the mother on behalf of the child—where the court did not make necessary findings regarding reasonable needs of the child for her health and maintenance relative to the well-being and accustomed standard of living of her and her parents, whether the presumptive support amount would exceed or not meet the reasonable needs of the child, and a calculation of the child's reasonable needs and expenses.

4. Attorney Fees—child support action—findings of fact —sufficiency

The trial court's findings adequately addressed a mother's insufficient means to defray the cost of a child support action, the court was not required to compare the parties' relative estates before awarding attorney fees, and the court made the necessary findings that the amount awarded was reasonable. Further, the father had adequate notice and an opportunity to be heard on the issue of attorney fees, including after the mother's attorney filed an amended affidavit, to which no objection was made. Where the child support order was vacated and remanded for other reasons, the attorney fee award was also vacated, to be reconsidered after a new determination on the mother's monthly child support expense.

Appeal by Defendant from order entered 19 January 2018 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 13 February 2019.

Collins Family Law Group, by Rebecca K. Watts, for Defendant-Appellant.

Arnold & Smith, PLLC, by Matthew R. Arnold, for Plaintiff-Appellee.

INMAN, Judge.

Defendant Jeffry Paul Burgett ("Mr. Burgett") appeals the district court order requiring him to pay his ex-spouse, Tracy Susan Thomas ("Ms. Thomas"), retroactive and prospective child support and attorney's fees. Mr. Burgett argues that the trial court: (1) failed to deduct expenses incurred from his rental property when calculating his gross monthly income; (2) abused its discretion in ordering him to pay $500 per month for his child's band expenses; (3) failed to make sufficient findings of fact when it deviated from the child support guidelines; and (4) erred in awarding Ms. Thomas attorney's fees. After careful review of the record and applicable law, we reverse in part, vacate in part, and remand.

I. Factual and Procedural Background

The record reflects the following facts:

Ms. Thomas and Mr. Burgett married on 14 July 2001, separated on 29 September 2013, and are now divorced. During their marriage, they adopted a minor child, D.N.B.,[1] who was born in 2004.

Following their separation, Ms. Thomas filed a complaint in Union County for, among other things, child custody, child support, equitable distribution, and attorney's fees. After a hearing, the district court (1) awarded Ms. Thomas temporary joint legal and primary physical custody, and Mr. Burgett temporary visitation rights; and (2) ordered Mr. Burgett to pay Ms. Thomas $1,036 per month in temporary child support, with an additional $12,700 in total arears in child support to be paid in monthly $50 installments. The trial court deferred for a further hearing regarding Ms. Thomas' claim for equitable distribution and attorney's fees. Mr. Burgett moved to Wisconsin shortly after the temporary order.

Mr. Burgett began receiving social security benefits after retiring as a pilot in 2015. In December 2015, he filed a motion to modify child support. Before the motion was heard, starting in November 2016, Mr. Burgett unilaterally reduced his monthly child support payments to $446.46 per month, without receiving court permission, in accordance with what he believed to be consistent with the North Carolina Child Support Guidelines ("the Guidelines"). Mr. Burgett contended that Ms. Thomas was receiving $1,251 per month directly from the Social Security Administration for the benefit of D.N.B. and that the child support amount should be recalculated to reflect that additional income. Ms. Thomas opposed the motion.

On 24 August 2016, the parties resolved their disputes on equitable distribution, permanent child custody, and alimony, but could not reach an agreement regarding permanent child support.[2] Following hearings in May and July 2017 in Union County District Court, on 19 January 2018, the trial court ordered Mr. Burgett to pay: (1) $1,679.91 per month in ongoing child support; (2) $21,176.74 in retroactive child support at $50 per month; and (3) $15,000 for a portion of Ms. Thomas' attorney's fees. Mr. Burgett timely appealed.

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1. We use the above pseudonym to preserve the juvenile's anonymity.

2. The trial court's order pursuant to the parties' settlement inadvertently states that permanent child support was resolved.

II. Analysis

A. Rental Property Expenses Attributable to Gross Income

[1] Mr. Burgett first argues that the trial court erred in failing to deduct rental property expenses from its calculation of his monthly gross income. In child support cases, determinations of gross income are conclusions of law reviewed *de novo*, rather than findings of fact. *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992). If the trial court labels a conclusion of law as a finding of fact, the appellate court still employs *de novo* review. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646 (2000); *Eakes v. Eakes*, 194 N.C. App. 303, 311, 669 S.E.2d 891, 897 (2008).

The Guidelines define "income" as a "parent's actual gross income from any source, including but not limited to . . . rental of property." N.C. Child Support Guidelines 2018 Ann. R. 53. The calculation of actual gross income derived from rental of property is "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." *Id.* Although the Guidelines do not define "ordinary and necessary expenses," this Court has explained that such expenses include "repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Mortgage principal payments, however, are not an 'ordinary and necessary expense' within the meaning of the Guidelines." *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182.

In our case, Mr. Burgett's financial affidavit lists his total monthly gross income at $9,205.24—an accumulation of wages, rent, and social security and pension benefits. The affidavit goes on to provide that Mr. Burgett—paralleling his testimony at trial—owns a rental property which he leases to his adult son for $1,137.63 per month. The monthly $1,137.63 payment, however, is offset by $333.32 in property tax payments and $44.08 per month in renter's insurance.[3]

In finding of fact 18, "per his Financial Affidavit," the trial court calculated Mr. Burgett's gross monthly income at $9,205, noting that the rent his son paid was used for the mortgage payment. Mr. Burgett contends that the trial court did not factor in the other required rental expenses into its calculation of gross income. We agree that insurance and property tax expenditures should be deducted in calculating gross income,

3. Mr. Burgett also has a monthly mortgage payment equal to the rent charged to his son. While the record does not reveal whether that payment encompasses both principal and interest, upon remand, if any portion of that payment includes interest, it is an expense that can be deducted from Mr. Burgett's income for purposes of the Guidelines. *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182.

as the Guidelines provide. N.C. Child Support Guidelines 2018 Ann. R. 53; *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182. But on the record before us, it appears the trial court did not deduct those expenses from Mr. Burgett's income when calculating his gross income. *See Burnett v. Wheeler*, 128 N.C. App. 174, 176, 493 S.E.2d 804, 806 (1997) (reversing and remanding a child support order because it was unclear whether the trial court deducted expenses in calculating a supporting parent's gross income).

"In orders of child support, the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors." *Id.* at 176, 493 S.E.2d at 806 (citing *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). "In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence." *Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

The trial court's finding of fact 18 is the sole finding related to Mr. Burgett's rental property. There are no findings indicating how the trial court treated the insurance and tax expenses associated with the rental property. Because the Guidelines include insurance and taxes as ordinary and necessary expenses, the trial court was required to explain its decision relative to the evidence of such expenses submitted by Mr. Burgett. Without any evidence indicating the trial court's contemplation of those expenses, we do not have enough findings to conduct adequate review. We thus vacate and remand back to the trial court for more specific findings.

We are unpersuaded by Ms. Thomas' arguments that the trial court did not err in calculating Mr. Burgett's monthly gross income. Ms. Thomas contends that the trial court "determine[d] the weight and credibility" of Mr. Burgett's evidence and adequately decided not to include certain expenses in its calculation. However, as in *Burnett*, even "if the trial court chose not to find [Mr. Burgett's evidence] credible at all and therefore did not factor it into its computation," its findings do not provide its rationale for doing so.[4] 128 N.C. App. at 176, 493 S.E.2d at 806; *see also Coble*, 300 N.C. at 714, 268 S.E.2d at 190 ("What all this evidence *does* show, however, is a matter for the trial court to determine in appropriate factual findings." (emphasis in original)).

4. In the same vein, Ms. Thomas also points out that portions of Mr. Burgett's financial affidavit conflict with one another. Part I of his financial affidavit fails to indicate any ordinary and necessary expenses associated with the rental property. Yet, in Part III, Mr. Burgett lists the expenses in dispute. Any apparent discrepancy argued by Ms. Thomas was for the trial court to weigh and resolve, which it failed to acknowledge in its order.

Ms. Thomas also argues that the trial court properly "exercised its discretion to impute income from [Mr. Burgett's] rental property" because there was evidence that he was "renting the property to his adult son at a below market rate. . . . [and] was not making a good faith effort to obtain the highest and best rental income from the property." Ms. Thomas contends that because the trial court "failed to include specific findings of fact regarding this imputation," this case "should be remanded only for the limited purpose of making additional findings of fact consistent with the imputation of rental income." But the record does not reflect that Ms. Thomas raised this issue at trial or that it was ever contemplated by the trial court. Our review of the record reveals no evidence concerning the fair market rate of the rental property or Mr. Burgett's effort in obtaining the appropriate amount of rental income. As such, in remanding this issue back to the trial court regarding the proper findings as to ordinary and necessary expenses, we decline to remand for findings concerning the appropriate valuation of rental income.

B. Extraordinary Expenses

[2] Mr. Burgett next argues that the trial court erred in finding that Ms. Thomas incurs an extraordinary expense of $500 per month for D.N.B.'s participation in a school band program. "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a 'determination of whether there was a clear abuse of discretion.' " *Biggs v. Greer*, 136 N.C. App. 294, 296, 524 S.E.2d 577, 581 (2000) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). We "review whether the trial court's findings are supported by competent evidence." *Doan v. Doan*, 156 N.C. App. 570, 572, 577 S.E.2d 146, 148 (2003).

The Guidelines allow a trial court, in its discretion, to add to the basic child support obligation for "extraordinary expenses," which include:

> (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes . . . if the court determines the expenses are reasonable, necessary, and in the child's best interest.

N.C. Child Support Guidelines 2018 Ann. R. 55. Although the Guidelines only reference two instances of extraordinary expenses, we have held that "the list of extraordinary expenses . . . is not exhaustive of the

expenses that can be included."[5] *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (1994) (quotation marks and citation omitted).

In findings of fact 20 and 21, the trial court found:

> The minor child, [D.N.B.], has special needs, and her participation in therapy/counseling and in band are legitimate and reasonable extraordinary expenses, given her special needs.
>
> [Ms. Thomas] incurs out of pocket expenses for the minor child's therapy at a rate of $40.00 per week ($173.20 per month), and *an average of $500.00 per month on band and related expenses*.

(emphasis added). During the May 2017 trial, Ms. Thomas testified that D.N.B. suffers from dyspraxia—a neurological disorder generally affecting her motor skills—sensory integration dysfunction, and reactive attachment disorder.[6] D.N.B. has participated in occupational therapy since she was in second grade to improve her physical and social skills. D.N.B.'s therapist recommended that she get involved in music therapy to help her hand-eye coordination and social skills, and to experience "more fun" compared to occupational therapy sessions.

In May 2017, D.N.B. was about to begin eighth grade and was a band member and a member of color guard at her school. Ms. Thomas testified that band participation cost $500 per year. Ms. Thomas further testified that D.N.B.'s prospective additional participation in the "honor band" would cost "approximately [$500] per month" based on a fee sheet given to her by a person affiliated with band registration.[7] However, Ms. Thomas also admitted that these costs were conditioned on D.N.B. successfully auditioning for a spot in the honor band.

We agree with Mr. Burgett that Ms. Thomas' cost estimates are too hypothetical and speculative to be considered competent evidence to allow the trial court to find that D.N.B. requires $500 per month for band

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5. We do not need to address whether the expenses related to D.N.B.'s band participation were appropriately considered an extraordinary expense by the trial court, as that issue was not raised by Mr. Burgett.

6. Mr. Burgett did not object at trial nor does he contest on appeal D.N.B.'s medical conditions.

7. While Ms. Thomas testified that she had "written the secretary," the record discloses that she was also in contact with a "band treasurer," by email and telephone. It is unclear whether Ms. Thomas spoke to two separate people or only one.

expenditures. While the "trial court has wide discretion in the determination of extraordinary expenses, there must nevertheless exist some evidence to support the court's determination." *Doan*, 156 N.C. App. at 573, 577 S.E.2d at 149. In *Witherow v. Witherow*, we dealt with a comparable issue involving a plaintiff who argued that the trial court erred in taking into its consideration rental payments which the defendant was not making at the time of the hearing, but which he testified he "*might make in the future* upon moving out of his parents' residence." 99 N.C. App. 61, 64, 392 S.E.2d 627, 630 (1990) (emphasis added). The defendant provided in his financial affidavit that he "pays $500 per month as rent[]," but testified that he had lived in his parents' home since his separation with the plaintiff and paid no rent. *Id.* In denying the defendant's argument that "he has a right to be able to afford to move from his parents['] home in the future," we concluded that the trial court erroneously "include[d] personal expenditures not yet made by a party with no concrete plans to make such an expenditure." *Id.* Although *Witherow*'s issue involved the defendant's relative ability to pay child support—rather than determining the proper amount of extraordinary expenses—we are persuaded by the general proposition that "an award which takes into consideration an unsubstantiated expense rather than a current expense is an abuse of the court's discretion." *Id.*

Here, much like in *Witherow*, at the time of the parties' hearing, Ms. Thomas was not required to pay $500 per month on band expenses as D.N.B. had yet to audition and acquire a spot on the honor band. The only actual band expense Ms. Thomas incurred by the July 2017 hearing was the annual fee of $500. Further, scant evidence was introduced as to the person Ms. Thomas communicated with who provided her with the estimated costs that led to Ms. Thomas' $500 per month calculation.[8] Because the trial court lacked competent evidence to find that Ms. Thomas incurs a $500 extraordinary expense for band and other related expenses, we reverse that finding and remand for further proceedings.

Ms. Thomas cites to our opinion in *Doan* and contends that, while D.N.B.'s band "expenses are estimated[,] [] the probability of incurring these expenses is high based on [her] reputation and progress during her time participating in" band. In *Doan*, we determined that a child's figure-skating expenses could be an extraordinary expense but that there was no competent evidence to sustain the trial court's calculated

8. The record contains email correspondence between Ms. Thomas and the "band treasurer" discussing band expenditures. But the band treasurer noted that certain fees were "not all inclusive nor [were those] fees set in stone." There was also an apparent phone conversation between the two that is not recounted in the record.

amount. 156 N.C. App. at 572-75, 577 S.E.2d at 148-50. Ms. Thomas argues, because we held in *Doan* that "the child ha[d] a unique talent for ice skating and ha[d] both the drive and physical potential to become an Olympic-caliber skater, and that the monetary costs associated with the child's skating [we]re high for a person of [the] defendant's financial status," it is consistent with D.N.B.'s apparent superior band participation. *Doan*, however, did not discuss the child's skating prowess relative to the concrete nature of the purported expenses, but instead addressed whether skating could be labeled an extraordinary expense. Thus, Ms. Thomas' reliance on *Doan* is misplaced. If, on remand, the trial court determines that D.N.B. is actually participating in the honor band, and receives nonspeculative evidence concerning the expense, it must make findings to support any award based on those expenses.

C. Deviating from the Guidelines

[3] In finding of fact 30, the trial court determined:

> This Court finds sufficient cause to justify *a deviation in the North Carolina Child Support Guidelines* in this case, and finds that it is in the best interest[9] of the minor child herein that *[Mr. Burgett] not receive a credit for the social security payments that [Ms. Thomas] receives on behalf of the minor child* against the appropriate worksheet A monthly child support amount, as shown.[10]

(emphasis added). Mr. Burgett argues that the trial court, with respect to his social security benefits, did not make sufficient findings of fact showing that a deviation of the Guidelines was warranted.

Regarding social security benefits, the Guidelines mandate:

> Social Security benefits received for the benefit of a child as a result of the . . . retirement of either parent are included as income attributed to the parent on whose earnings record the benefits are paid, but are deductible from that parent's child support obligation.

N.C. Child Support Guidelines 2018 Ann. R. 53. In other words, "the Guidelines provide that Social Security benefits received on behalf of a

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9. We note that, while Mr. Burgett argues that the trial court here erroneously used the "best interests of the child" standard, we need not discuss it, as we conclude that it failed to make the requisite statutory findings in deviating from the Guidelines.

10. The trial court reiterated this finding in conclusion of law 3.

child are included as income to the parent," but "once the child support obligation has been determined, [those] benefits are deducted from that parent's support obligation" that he or she actually pays out month to month. *New Hanover Child Support Enforcement v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008).

Although the trial court is obligated to "determine the amount of child support payments by applying the presumptive guidelines," it may deviate from the Guidelines under the following circumstances:

> If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines.

N.C. Gen. Stat. § 50-13.4(c) (2017). If the trial court does deviate from the Guidelines, "the court shall make findings of fact as to the criteria that justify varying from the [G]uidelines and the basis for the amount ordered." *Id.*

This Court has stated that the trial court must adhere to a four-step process to deviate from the Guidelines:

> *First*, the trial court must determine the presumptive child support amount under the Guidelines. *Second*, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. *Third*, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. *Fourth*, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Sain v. Sain, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999) (emphasis added) (internal quotation marks and citations omitted). When the trial court is to make findings pertaining to the child's reasonable needs and the relative ability of each parent to provide support, we have stated that, pursuant to N.C. Gen. Stat. § 50-13.4(c1), it must consider and include in its findings:

> [T]he reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c1) (2017); *accord Spicer v. Spicer*, 168 N.C. App. 283, 293, 607 S.E.2d 678, 685 (2005) ("These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " (quoting *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993))).[11]

As discussed *supra* in Part B, we also review "[a] trial court's deviation from the Guidelines . . . under an abuse of discretion standard." *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). But, before we can "determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law," the trial court's "findings of fact must show justification for the deviation and a basis for the amount ordered." *Id.* at 644-45, 507 S.E.2d at 593 (quotation marks and citations omitted).

Mr. Burgett argues that the trial court failed to address the third and fourth steps necessary to deviate from the Guidelines.[12] We agree. The record before us is akin to the record in *Spicer* and *Lukinoff*, in which we held that the trial court's order lacked findings necessary for us to review whether it abused its discretion in deviating from the Guidelines.

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11. As Ms. Thomas requested that the trial court deviate from the Guidelines by written notice of intent on 26 January 2016 pursuant to Section 50-13.4(c), the trial court was encouraged to make these findings.

12. Contrary to Mr. Burgett's and Ms. Thomas' concessions that the trial court determined the presumptive support amount, the order does not include that calculation. The order references a child support worksheet that is not included in the record. The only amounts of support the trial court determined were the final amount of $1,679.91 per month and the $21,176.74 in back child support that Mr. Burgett was ordered to pay. These amounts, however, are calculations derived *after* the trial court deviated from the Guidelines in refusing to deduct Mr. Burgett's social security income. However, because both parties do not argue this issue, we do not address it on appeal.

Spicer, 168 N.C. App. at 292-95, 607 S.E.2d at 684-86; *Lukinoff*, 131 N.C. App. at 645-46, 507 S.E.2d at 594.

In *Spicer*, we concluded that the trial court did not make any specific findings regarding the reasonable needs of the child because it "simply found, without further explanation, that the child's reasonable needs and expenses totaled $1,260.10 per month." *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685-86. The trial court lacked "specific consideration of what amount [was] necessary for the child's health, education, and maintenance" and omitted analysis considering "the accustomed standard of living of the child and the parties." *Id.* at 293-94, 607 S.E.2d at 685-86 (quotation marks and citation omitted). Similarly, in *Lukinoff*, we held that the trial court failed to make any findings regarding the child's reasonable needs, "including his education, maintenance, or accustomed standard of living." *Lukinoff*, 131 N.C. App. at 645-46, 507 S.E.2d at 594. Moreover, the trial court's findings failed to "indicate . . . whether the presumptive amount . . . would not meet or would exceed the reasonable needs of the child." *Id.* at 646, 507 S.E.2d at 594 (emphasis omitted) (quotation marks and citation omitted).

As in *Spicer* and *Lukinoff*, the trial court here failed to satisfy steps three and four of the four-step process when it deviated from the Guidelines. There is a dearth of findings concerning D.N.B.'s health and maintenance relative to the well-being and accustomed standard of living of her and her parents, which appear below, in relevant part:

> [Ms. Thomas] works for US Airways/American Airlines, where she is employed as a flight attendant.
>
> [Ms. Thomas] earns an average gross monthly income of $2,493.00 per month.
>
> [Mr. Burgett] earns a gross monthly income of $9,205.00 per month from all combined sources, per his Financial Affidavit . . . .
>
> [Ms. Thomas] and . . . [D.N.B.] live in a home owned by [Ms. Thomas'] mother, and [Ms. Thomas] struggles to make ends meet.
>
> The minor child, [D.N.B.], has special needs, and her participation in therapy/counseling and in band are legitimate and reasonable extraordinary expenses, given her special needs.

> [Ms. Thomas] incurs out of pocket expenses for the minor child's therapy at a rate of $40.00 per week ($173.20 per month), and an average of $500.00 per month on band and related expenses.
>
> There is a significant disparity in income between the parties. . . .
>
> On average, [D.N.B.] spends three-hundred and eight (308) overnights per year with [Ms. Thomas], and approximately fifty-seven (57) overnights per year with [Mr. Burgett]. . . .
>
> [Mr. Burgett] qualifies for social security payments, and a portion of those payments are paid for the benefit of [D.N.B.]; [Ms. Thomas] is the payee of those funds, which total $1,255.00 per month.

The trial court made no findings regarding D.N.B.'s educational expenses or whether application of the presumptive guidelines would exceed or not meet the reasonable needs of D.N.B. or whether the presumptive support would be unjust or inappropriate. *See Lukinoff*, 131 N.C. App. at 646, 507 S.E.2d at 594 ("An award other than that set forth in the Guidelines is proper only when the trial court determines that the greater weight of the evidence establishes 'the [G]uidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate.' " (emphasis omitted) (quoting N.C. Gen. Stat. § 50-13.4(c)). Further, the trial court failed to calculate D.N.B.'s reasonable needs and expenses. *See Beamer v. Beamer*, 169 N.C. App. 594, 599, 610 S.E.2d 220, 224 (2005) ("Without knowing what the children's reasonable expenses are, we cannot review the trial court's decision to deviate from the Guidelines or the amount ultimately awarded.").

While the trial court may have been correct in deviating from the Guidelines, "[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it[.]" *Coble*, 300 N.C. at 712, 268 S.E.2d at 189 (emphasis in original). Absent such specific findings, "we are precluded from reviewing the basis of the award." *Spicer*, 168 N.C. App. at 294-95, 607 S.E.2d at 686. We thus vacate and remand this issue to the trial court for more specific findings pursuant to Section 50-13.4(c) and this Court's precedents.

D. Attorney's Fees

[4] Mr. Burgett's last challenge is to the trial court's order that he pay $15,000 for Ms. Thomas' attorney's fees.

Mr. Burgett makes three arguments to support his contention that the trial court erred in awarding Ms. Thomas attorney's fees, and we discuss each one in turn.

In actions involving child support:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]

N.C. Gen. Stat. § 50-13.6 (2017); *see also Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) ("[T]he trial court [is] required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit."). Because this is also an "action solely for child support, the court must make the required finding . . . that the party required to furnish adequate support failed to do so when the action was initiated." *Spicer*, 168 N.C. App. at 296, 607 S.E.2d at 687 (citing *Stanback v. Stanback*, 287 N.C. 448, 462, 215 S.E.2d 30, 40 (1975)). "Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980).

In finding of fact 32, the trial court determined:

> [Ms. Thomas] is an interested party, acting in good faith, without the means to pursue child support for [D.N.B.'s] benefit, but for an award of attorney's fees.

Mr. Burgett contends that this sole "finding" as to attorney's fees is inadequate because the trial court failed to "determin[e] that [Ms. Thomas] ha[d] insufficient means to defray the costs of the action."[13] *See Atwell*

13. Because Mr. Burgett does not argue that the trial court failed in making the appropriate findings regarding Ms. Thomas' good faith or his failure to provide support at the time of the action, we need not address these issues.

v. Atwell, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985) (stating that a "finding" as to one's ability to defray the costs of suit "is, in reality, a conclusion of law" that must be supported by adequate factual findings). Specifically, Mr. Burgett argues that there are no evidentiary findings concerning Ms. Thomas' expenses nor is there a finding of the parties' estates that help support the trial court's determination that Ms. Thomas cannot independently pay for her action against him. We disagree.

When a trial court is making findings necessary to award attorney's fees pursuant to Section 50-13.6, "there is no need to compare the parties' relative estates when considering whether to award attorney's fees in child custody and support actions." *Taylor v. Taylor*, 343 N.C. 50, 57, 468 S.E.2d 33, 37 (1996). Mr. Burgett cites this Court's holding in *Barrett v. Barrett* that "a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses' estates may sometimes be appropriate." 140 N.C App. 369, 374, 536 S.E.2d 642, 646 (2000). *Barrett* does not mandate that the trial court compare the parties' estates. *See Van Every v. McGuire*, 348 N.C. 58, 60, 497 S.E.2d 689, 690 (1998) (holding that Section 50-13.6 "does not *require* the trial court to compare the relative estates of the parties" (emphasis in original)). Thus, we are unpersuaded that the trial court committed *per se* error by omitting findings discussing the parties' estates.

While " 'a bald statement that a party has insufficient means to defray the expenses of [a] suit' " is insufficient as a matter of law, the trial court here made related findings of fact that satisfy its statutory obligation. *Sarno v. Sarno*, __ N.C. App. __, __, 804 S.E.2d 819, 827 (2017) (quoting *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989)). The trial court made the following findings associated with Ms. Thomas' ability to pay her attorney's fees: (1) her monthly gross income is $2,493; (2) she lives at her mother's residence with D.N.B. and "struggles to make ends meet;" (3) she incurs $40 per week in medical expenses and $500 per month on band expenses; (4) since February 2015, she has received $1,255 per month from Mr. Burgett's social security payments; and (5) since November 2016, after Mr. Burgett unilaterally reduced his child support payment in contravention of the temporary child support amount of $1,036 per month, as well as an additional $50 per month in back child support, Ms. Thomas has received "a little less than $500 per month" from Mr. Burgett.

The trial court's findings not only show that Ms. Thomas' income is vastly inferior to Mr. Burgett's, but go well beyond the "bare statutory language" that she cannot employ adequate counsel. *Dixon v. Gordon*,

223 N.C. App. 365, 373, 734 S.E.2d 299, 305 (2012); *cf. id.* ("Although information regarding father's gross income and employment was present in the record in father's testimony, there are no findings in the trial court's order which detail this information."). These findings support the trial court's determination that, without, at least, partial payment of attorney's fees, Ms. Thomas would not, "as litigant, [be] able to meet [Mr. Burgett], as litigant, on substantially even terms with respect to representation by counsel." *Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982), *superseded in part by statute on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (1983); *see also Hudson*, 299 N.C. at 474, 263 S.E.2d at 725 ("[H]e or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.").

Mr. Burgett then argues that the trial court failed to make adequate findings pertaining to the reasonableness of its award regarding Ms. Thomas' attorney's time and skill during her representation. Mr. Burgett does not contend that the amount of attorney's fees is not supported by the evidence. *See Hudson*, 299 N.C. at 473, 263 S.E.2d at 724 ("[T]he *amount* of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." (emphasis in original)). He argues only that the trial court failed to make the appropriate statutory findings to determine its award was reasonable. We disagree.

The trial court expressly referenced and relied on Ms. Thomas' attorney's amended affidavit for attorney's fees—which came at the trial court's request. The detailed affidavit describes the attorney's experience and background in domestic relations law, her hourly rate, the total number of hours she worked on Ms. Thomas' case, and attaches as an exhibit more than 30 pages of records identifying the specific work she performed for Ms. Thomas. *See Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905-06 (1991) (holding that the trial court did not abuse its discretion in the amount of fees given based on findings of the hourly rate and number of hours worked provided by the plaintiff's attorneys' affidavits). We thus reject Mr. Burgett's argument.

Lastly, Mr. Burgett argues that the trial court erred in awarding attorney's fees without giving him an opportunity to be heard and contest Ms. Thomas' attorney's amended affidavit prior to the trial court's order. Mr. Burgett contends that this case is analogous to *Allen v. Allen*, 65 N.C. App. 86, 308 S.E.2d 656 (1983). In *Allen*, the trial court issued an order awarding custody to the defendant and directed the plaintiff to pay the defendant's attorney's fees but deferred a ruling as to the amount until a later date when the plaintiff would appear in court. *Id.* at 87, 308

S.E.2d at 657. Before another hearing, the defendant's counsel filed an affidavit itemizing his expenses and time spent on the case. *Id*. at 88, 308 S.E.2d at 658. A copy of the affidavit was never delivered to the plaintiff or his counsel, nor were they notified when the trial court would decide the matter on attorney's fees. *Id*. The day after the affidavit was filed, the trial court entered an *ex parte* judgment against the plaintiff, ordering him to pay over $16,000 in attorney's fees. *Id*.

In vacating the trial court's order, we reasoned that the plaintiff had the right to question the reasonableness of the affidavit and the services rendered. *Id*. We held that, because "parties have a right, not only to be present, but to be heard when their substantial rights and duties are being adjudged"—such as paying more than $16,000 in legal fees—the plaintiff should have been presented with the opportunity to "question the necessity or reasonableness of any service claimed, as well as the worth of any service approved." *Id*. at 88-89, 308 S.E.2d at 658-59.

Here, on 17 May 2017, Ms. Thomas' attorney served an affidavit of fees on Mr. Burgett's attorney. Two months later, in the morning prior to the July 2017 hearing, Ms. Thomas' attorney filed that same affidavit with the trial court, and the issue of fees and the affidavit itself was discussed at the hearing. Two months later, by email sent 21 September 2017, the trial court informed the parties of its findings and rulings to be declared in its later order, including that Ms. Thomas should be awarded attorney's fees. In that email, the trial court instructed Ms. Thomas' attorney to "provide an affidavit of her time" to the trial court and Mr. Burgett's attorney and told the parties that "[i]f either of [them had] questions, don't hesitate to find me." Subsequently, Ms. Thomas' attorney filed her amended affidavit of fees on 11 January 2018 and served it on Mr. Burgett's attorney that same date. Eight days later, on 19 January 2018, the trial court entered its permanent child support order and ordered that Mr. Burgett pay $15,000 of the $23,132.50 in legal fees and expenses incurred by Ms. Thomas.

This case is readily distinguishable from *Allen* in that Mr. Burgett had adequate notice and frequent opportunities to address the trial court regarding Ms. Thomas' legal expenses. Throughout the litigation, Mr. Burgett and his attorney were notified by Ms. Thomas and the trial court regarding the issue of attorney's fees. Mr. Burgett chose not to object to Ms. Thomas' motion for attorney's fees during the July hearing. Mr. Burgett did not notify the trial court or Ms. Thomas' attorney of any objection to the amended affidavit filed and served at the trial court's request. Mr. Burgett argues that he "had no opportunity to be heard after

the requested amount" was amended by Ms. Thomas' attorney. Yet in his brief, Mr. Burgett concedes that Ms. Thomas' "counsel did serve [his] counsel with a copy of the amended affidavit." Mr. Burgett's attorney had eight days to contest anything within that amended affidavit but failed to act on it. Moreover, unlike *Allen*, the trial court only ordered Mr. Burgett to pay a portion, rather than the entirety, of Ms. Thomas' attorney's fees. Accordingly, we hold that the trial court did not deprive Mr. Burgett of his opportunity to be heard.[14]

Although we hold that the trial court did not err in awarding attorney's fees, we vacate and remand the award for the trial court to consider the amount in light of its new determination of Ms. Thomas' monthly child support expense. As we concluded in Part B, no competent evidence supported the trial court's finding that Ms. Thomas incurred a monthly expense of $500 for D.N.B.'s band participation. The record does not indicate whether, or how, the trial court weighed its erroneous finding of this monthly expense in its calculation of the attorney's fees award.

III. Conclusion

In sum, we reverse the trial court's finding that at the time of the hearing, Ms. Thomas was incurring $500 in monthly expenses for D.N.B.'s band participation and we vacate the trial court's order with respect to its (1) calculation of Mr. Burgett's gross income; (2) deviation from the Guidelines in not removing Mr. Burgett's social security payments from his child support obligation; and (3) award of attorney's fees, and remand these matters for further proceedings consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges DILLON and COLLINS concur.

14. Mr. Burgett also argues in his reply brief that there is "nothing in the record that indicates when [his] attorney actually received" a copy of the amended affidavit, but fails to provide evidence of a contrary date of receipt. Absent any conflicting evidence, we rely on the record before us and the stipulated date of the certificate of service.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 May 2019)

COLEY v. COWAN No. 18-1020	Wayne (17CVS1550)	Reversed in part, Affirmed in part, and Remanded.
IN RE J.J. No. 18-989	Durham (07JA262) (08JA352-353) (14JA157) (14JA88-89)	Affirmed
IN RE K.L.C. No. 18-1003	Robeson (13JT352)	Vacated
IN RE N.S.J No. 18-1005	Yadkin (16J60-63)	Affirmed
IN RE T.J.M.L. No. 18-1022	Alleghany (16JT24)	Vacated and Remanded
McFARLAND v. PITT CTY. BD. OF EDUC. No. 18-946	Pitt (17CVS2739)	Appeal dismissed.
ORANGE CTY. EX REL. LACY v. CANUP No. 18-1139	Orange (17CVD1633)	Affirmed in Part, Reversed in Part and Remanded
RIDER v. PRYOR No. 18-821	Henderson (14CVS1610)	Affirmed
STATE v. BAMACA No. 18-1244	Pitt (17CR056158)	Vacated and Remanded
STATE v. BROWN No. 18-1044	Mecklenburg (16CRS205383-84)	Affirmed
STATE v. CASE No. 18-746	Madison (17CRS50129)	No Error
STATE v. DUDLEY No. 18-1121	Guilford (99CRS110602)	Affirmed
STATE v. GRAHAM No. 18-1	New Hanover (16CRS51705-06)	Affirmed
STATE v. JONES No. 18-502	Mecklenburg (08CRS250566-67) (08CRS80584)	Appeal Dismissed; Petitions Denied

STATE v. JORDAN No. 18-875	Johnston (17CRS2089) (17CRS53724)	No error in part; No plain error in part.
STATE v. NEESE No. 18-1204	Randolph (16CRS53077)	No Error
STATE v. PHILLIP No. 18-1012	Durham (13CRS60812) (13CRS61115)	No Error
STATE v. RICHARDSON No. 18-696	Forsyth (17CRS197) (17CRS50582) (17CRS50584-85) (17CRS50622)	Dismissed in Part, No Error in Part.
STATE v. SANDERS No. 18-954	Edgecombe (16CRS50135)	No Error
STATE v. THOMPSON No. 18-557	Forsyth (16CRS60350)	No Error
STATE v. ZEY No. 18-955	Onslow (17CRS51429)	No Error
STATHUM-WARD v. WAL-MART STORES, INC. No. 18-738	Wake (16CVS8931)	No Error
STULL v. STULL No. 18-915	Jackson (12CVD217)	Remanded

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